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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 414

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

vs.

AARON A. B. CHATTERS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

A. M. WARREN,
GEORGE DENEGRE,
VICTOR LEOVY,
HENRY H. CHAFFE,
HARRY McCALL,
JAS. HY. BRUNS,
Attorneys for Petitioner.

(33,723)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 414

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PETITIONER,

vs.

AARON A. B. CHATTERS, RESPONDENT.

PETITION OF LOUISVILLE & NASHVILLE RAILROAD COMPANY FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Louisville & Nashville Railroad Company respectfully shows:

1.

That your petitioner is greatly aggrieved by the final judgment and opinion of the United States Circuit

Court of Appeals in the case of Louisville & Nashville Railroad Company and Southern Railway Company, plaintiffs in error, v. Aaron A. B. Chatters, defendant in error, No. 5169 of the docket of the said court, wherein said court held, on June 2, 1928, 26 Fed. (2d), 403, that the provision on an interstate coupon passenger ticket, that "In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line" (which said provision was authorized and required by the applicable lawful tariffs duly on file with the Interstate Commerce Commission), did not forbid the entry of a judgment against the initial carrier in a suit by a passenger for damage for personal injuries caused by the breaking of a window glass in a car, occurring while the said car was on the route of the delivering carrier, and long after it had left the possession, custody and control of the initial carrier; such judgment being predicated on the proposition that the train in question was operated from New Orleans, Louisiana, to Washington, D. C., as a through train over the routes of three separate carriers, and that in so operating the train the three carriers, whose routes were involved, engaged in a joint adventure or partnership, and, therefore, assumed a joint liability; and on the further proposition that the said car was incorporated in the said train by the initial carrier, by which it was cleaned, inspected, and, as might be considered necessary, repaired prior to incorporation in such train, and that in this connection the said initial carrier was

at fault, and that such fault or negligence caused or contributed to the accident, despite the fact that the said car was accepted by the subsequent connecting carriers along the through route and used by them.

2.

Petitioner insists that in declining to give full force and effect to the said provision in the ticket, the Circuit Court of Appeals was in error; that the said court should have held that the District Court erred in not granting your petitioner's request for a directed verdict in its favor. Petitioner further insists that the said Circuit Court of Appeals was in error in approving the action of the District Court in charging the jury that the transportation of the said passenger was a joint adventure between the respective carriers, instead of a separate undertaking on the part of each carrier as to its own route, and in refusing to charge the jury that in the absence of fault or negligence on the part of this petitioner, it could not be held liable for an accident occurring while the train was on the route of another carrier and entirely under the possession and control of such other carrier.

3.

The question involved is of far-reaching importance, in that it affects the rights and liabilities of connecting carriers of passengers traveling on through interstate trains on through coupon tickets, and deals with the construction and interpretation of a provision which

we understand to be universally used on through coupon tickets.

4.

Petitoner now further shows the facts and history of this cause to be as follows:

That on June 29, 1926, Aaron A. B. Chatters instituted suit in the United States District Court for the Eastern District of Louisiana, against your petitioner, Louisville & Nashville Railroad Company, and against Southern Railway Company, for the sum of $36,087, with legal interest (5 per cent per annum) from judicial demand until paid; said suit being based on the allegations that the said Chatters, a citizen of the State of Louisiana, on or about January 26, 1925, purchased from your petitioner, a citizen of the State of Kentucky, at New Orleans, Louisiana, a through ticket from New Orleans, Louisiana, to Washington, D. C.; that on the following day at New Orleans, Louisiana, he boarded a regular passenger train operated by your petitioner, on which said train he was transported to Atlanta, and there the train was taken over and placed in the care, custody and control of the Southern Railway Company, a citizen of the States of Kentucky and Virginia; that when the said train reached a point of about two hours' travel from Washington, D. C., and while it was still in the care, custody and control of the Southern Railway Company, a screen frame attached to one of the windows in the car in which the said plaintiff was sitting, became loose on one end, swinging to the rear, broke a glass pane in the window of

the said car, as a result of which, particles of broken glass became lodged in plaintiff's eyes, causing him various injuries aggregating the amount claimed (R., pp. 2-7).

5.

That after certain exceptions, immaterial hereto, had been filed by both defendants and had been overruled by the court, and after a supplemental petition, immaterial hereto, had been filed, both defendants filed answers to the said petitions, the answer of your petitioner (Rec., pp. 45-51) averring that for many years there has been through train service between New Orleans, Louisiana, and Washington, D. C., performed by your petitioner, the Atlanta and West Point Railroad Company—the Western Railway of Alabama and the Southern Railway Company in the following manner:

Your petitioner owns and operates along this route a railroad between New Orleans, Louisiana and Montgomery, Alabama; the Atlanta and West Point Railroad Company—the Western Railway of Alabama, owns and operates a railroad between Montgomery, Alabama, and Atlanta, Georgia, and the Southern Railway Company owns and operates a railroad between Atlanta, Georgia, and Washington, D. C.; that the operation of a through train along the said route from New Orleans, Louisiana, to Washington, D. C., is, in no sense of the word, joint between the three railroads named, or any of them; that each railroad has full, complete and entire custody and control of the train while on its own railroad, and that tickets for a through

journey from New Orleans, Louisiana, to Washington, D. C., are the ordinary coupon tickets, there being a separate coupon for each of the three railroads involved, and that these tickets, including the one sold to plaintiff, contain the following provision:

> "In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line."

and defendant expressly pleaded the benefit of this clause in the ticket, and further denied that any car incorporated by it into the train in question was, while in defendant's custody, in a defective or unsafe or dangerous condition; and, further denied that if, at the time of the accident, there was any defect in the said car, that such defect was in any wise caused or contributed to by any negligent act or omission on the part of this defendant, its servants, agents or employees.

6.

The case was duly tried before a jury on April 21, 22, 25 and 26, 1927, the Honorable Louis H. Burns, Judge, presiding. The uncontradicted evidence tended to show that plaintiff, Chatters, purchased at New Orleans, Louisiana, from your petitioner, a coupon ticket from New Orleans, Louisiana, to Washington, D. C., which contained the provision hereinabove quoted. The tariff duly filed with the Interstate Commerce Commission, in force and effect in January, 1926, providing passenger rates over the route in question be-

tween New Orleans, Louisiana, and Washington, D. C., prescribed that coupon tickets should contain the provision hereinbefore quoted. That plaintiff traveling on the said ticket left New Orleans, Louisiana, at five o'clock p. m., on January 26, 1926, in Southern combination car, No. 698, which said car belonged to the Southern Railway Company, and remained in the said car until he arrived at Washington, D. C.; that the Louisville & Nashville Railroad Company handled the train of which this car was a part, to Montgomery, Alabama, which was the end of its line on the route to Washington, and there delivered the train to the Atlanta & West Point Railway Company—The Western Railway of Alabama, which handled the said train to Atlanta, Georgia, the end of its line, and there delivered it to the Southern Railway Company. The Southern Railway Company handled the said train, including combination car, No. 698, from Atlanta, Georgia, to Washington, D. C.

At about one o'clock on the morning of January 28, 1926, while the said train was being handled by the Southern Railway Company and was about two hours south of Washington, a window screen on said car, No. 698, flew back and broke a glass in the window behind it, and caused plaintiff, Chatters, the injuries because of which this suit was brought. The said car was regularly used in the through service between New Orleans, Louisiana, and Washington, D. C. On the morning of January 26, 1926, the said car arrived in New Orleans in a train operated by the Louisville & Nashville Rail-

road Company; was taken to the yards of the said company in the City of New Orleans; was washed and cleaned and was then examined and inspected by two employees of the said Louisville & Nashville Railroad Company, whose testimony was to the effect that they found nothing wrong with the screens of the said car. Any repairs to the said car made by the Louisville & Nashville Railroad Company would have been charged to, and paid by, the Southern Railway Company, the owner of the said car. Shortly before the said car was incorporated in the train which left New Orleans at five o'clock p. m., on January 26, 1926, it was agin inspected by employees of the Louisville & Nashville Railroad Company, whose testimony was to the effect that they discovered nothing the matter with the screens of the said car. The testimony indicated that at Atlanta, Georgia, and at several other subsequent points en route, other inspections of the entire train, including the said car, were made by employees of the Southern Railway Company, whose testimony was to the effect that they discovered nothing the matter with the screens of the said car.

7.

That in due course and in an appropriate manner, the court was requested to direct a verdict in favor of this petitioner, which request was refused. That the following alternative request for special instructions to the jury was made by this petitioner:

> "(In the alternative and if No. 1 be not given), I charge you that if you find that the

ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provision:

'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'

or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff insofar as said Louisville & Nashville Railroad Company is concerned" (Rec., p. 550).

which request was likewise refused; that to the refusal of the court to give these requests appropriate and timely exceptions were reserved and bills of exception taken. That in its charge to the jury, the court stated, among other things, that:

"Under the circumstances as they are shown here the liability of these two defendant carriers is joint * * *. Here is a joint enterprise in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff

to deliver him in Washington safely in this particular train."

That this theory of partnership or joint obligation between the two defendants ran throughout the charge, as will be seen by reference to the charge itself, which is set forth in full at pp. 537-548 of the Record.

That to those portions of the charge characterizing the relationship of the carriers as a partnership or joint enterprise, your petitioner duly and timely excepted and reserved a bill of exceptions.

8.

That on April 26, 1927, after the case had been closed and the charge given, the jury found in favor of the plaintiff and against the two defendant railroads jointly in the sum of $3,087 (Rec., p. 57), on which said verdict on the same date, a judgment was entered in favor of the plaintiff and against the two railroad companies jointly and *in solido*, in the sum of $3,087, with legal interest thereon from the date thereof until paid (Rec., pp. 58-59).

That on April 28, 1927, the two defendants filed a motion for a new trial (Rec., pp. 59-60), which motion was heard on May 4, 1927, and on the same day denied (Rec., p. 61), and on May 18, 1927, your petitioner filed its petiton for a Writ of Error with supersedeas, which petition was on the same day allowed, the supersedeas bond being fixed at $5,000 (Rec., pp. 62-63). That on May 18, 1927, your petitioner assigned the

following errors, among them, to the court's action (Rec., pp. 64-71): • • •

III.

"That the Court erred in not directing the jury to find a verdict for this defendant upon the motion made by this defendant at the closing of the taking of evidence, said motion being made not only in the form of a written request for the following special charge:

'I charge you that you should find in favor of the defendant, Louisville & Nashville Railroad Company, and against plaintiff, Aaron A. B. Chatters, in so far as that defendant is concerned,'

but also orally, as follows:

'Mr. McCall:
I move for a directed verdict • • •

IV.

That the Court erred in refusing to give the following charge to the jury requested by this defendant, to-wit:

'(In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provision:

In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.

or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff insofar as said Louisville & Nashville Railroad is concerned.'

V.

That the Court erred in charging the jury as follows: * * *

The case is simple. Two railroad companies are sued jointly in this case, because the accident happened while the Plaintiff was a passenger and they were acting as carriers for hire, common carriers, and that relation to the passenger made the circumstances of the case somewhat different from what it would be ordinarily. * * *

In cases such as this where the relation is established of carrier and passenger, the passenger, because of his contract of carriage, need only to show that he was such passenger, and that as such passenger the carrier failed to set him down safely at his destination, and if he shows that, then the burden is upon the carrier to show that it had shown the highest degree of care, skill and foresight, of which as carrier, it was capable. In other words, upon the passenger showing that he was injured, the burden of

proof is upon the carrier to prove what negligence and whose negligence prevented the fulfillment of its contract of carriage to deposit him safely at his destination.

If the defendants fail to satisfactorily explain, in this case—these carriers, two railroad companies the defendants—if they failed to satisfactorily explain the accident, then negligence will be presumed and they will therefore be liable to the passenger for whatever damage he sustained. * * *

In this case, the burden being upon the plaintiff to prove his quality as a passenger and the fact that he was injured, the first thing to determine is whether he was a passenger, and that seems to be beyond dispute in this case. Was he hurt? Did the carrier fail to deliver him safely to his journey's end? That does not mean they are actual insurers of the passenger, but when the plaintiff has shown he was a passenger, and hurt in transit, and not safely deposited at his destination, the burden is upon the defendant carriers to absolve themselves of negligence, otherwise the negligence will be presumed. * * *

Now, if you determine that this plaintiff, Chatters, was a passenger, and that he was hurt, and the two defendants who are jointly sued, did not exercise that high degree of care, skill and foresight which the law imposes on them in the care of passengers, then the next thing—I say sued two jointly, and right here I will state for this reason: in a suit by a passenger, more especially in a case such as this, on the face of the ticket there are some words printed to the effect that: 'In selling this ticket and

checking baggage hereon, the selling carrier acts only as agent and is not responsible beyond its own line,' would be binding upon the passenger, but in this case the selling or initial carrier, the selling agency the Louisville & Nashville Railroad Company did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership.

It made up this train in New Orleans called the Piedmont Limited, a regular train running between New Orleans and Washington, D. C., of coaches under some agreement between two component carriers of that line, that is to say the Louisville & Nashville and the Atlanta & Westpoint and the Southern Railway Company. Whatever this agreement might be, this plaintiff would not be bound by it, but the Louisville & Nashville Railroad Company made up that train, set it in motion here, the plaintiff got aboard it as a passenger, sat in a particular coach, called a combination coach, the description of which you well know, staying in that coach continuously throughout the trip across the rails of the Louisville & Nashville Railroad and intermediate lines, and finally the Southern Railway within an hour or two of his destination when this accident happened by which a glass was broken and the flying debris causing the injury.

Under the circumstances as they are shown here the liability of these two defendant carriers is joint. We can ignore for all practical purposes the intermediate carrier. There is nothing shown here of the relationship of the parties in the evidence, more especially the rela-

tionship of the Atlanta & Westpoint, the intermediate carrier, and we are not concerned with it for the purpose of this case.

Here is a joint enterprise in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff to deliver him in Washington safely in this particular train.

Now the evidence shows that the local or original carrier was bound and did participate in the inspection of that train. They were responsible for its good condition, responsible for furnishing the train made up in a safe manner, responsible to its passengers and with its co-defendants to do and perform its part in the inspection and preparation of sending out that train with the highest degree of care, skill and foresight and that obligation continued. The Southern Railway Company on receiving this train was likewise obligated to this passenger, and to escape liability the burden was upon the Louisville & Nashville Railroad Company to show positively that this equipment, this latch on this particular screen in this case, was in good order when it left here, not worn, or in some other manner affected by the weather and age, and shift the burden thereby to the Southern Railway to show positively to your satisfaction that it used the highest degree of care and prudence in the handing of the train after it received it.

The evidence here as you heard it, tends to show while numerous inspections were no doubt made by both these defendant railroad companies, they resulted in nothing. They resulted

in no discovery of this defect in the screen which flew open and caused this alleged accident, and therefore between themselves neither one has shifted the burden upon the other.

Now, gentlemen, the case as I see it is very simple and as I have indicated, you should decide first whether or not these two defendant railroad companies have satisfactorily explained the burden as put upon them as I explained, and if not, then decide how much damage you should award to the plaintiff."

and on the same day (May 18, 1927), your petitioner filed a supersedeas bond in the sum of $5,000 (Rec., pp. 71-72). That on July 6, 1927 (this being within the time allowed for that purpose by the court, as extended) your petitioner filed four bills of exception. The first two of these (Rec., pp. 100-103 and 536-549) dealt with failure of Trial Judge to give a direct verdict, and in connection therewith the entire record (Rec., pp. 104-535) was brought up. That the third bill of exceptions (Rec., pp. 549-553) dealt with the refusal of the court to give the special charge herein above quoted in full, and the fourth bill of exceptions (Rec., 553-558) attacked those portions of the charge actually given by the trial court, characterizing the relationship of the defendant railroad companies as a joint adventure or joint enterprise.

9.

That the said cause was entered and docketed in the said Court of Appeals, entitled, "Louisville & Nashville Railroad Company and Southern Railway Company,

Plaintiff in Error, *vs.* Aaron A. B. Chatters, Defendant in Error" and numbered 5169 of said docket. That on March 20, 1928, the case came on to be heard in the Circuit Court of Appeals, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan and the Honorable Rufus E. Foster, and on June 2, 1928, a decree was entered in the said cause by the said Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court (Rec., p. 624). That your petitioner, in due course, applied to the said Court of Appeals for a rehearing, which application was on July 10, 1928, denied (Rec., p. 654).

10.

Your petitioner is advised that such judgment of the Circuit Court of Appeals is final and is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision; that a review of the said judgment presents a Federal question, in that it involves the liability of an interstate carrier of passengers, and more particularly involves the interpretation and construction of a provision of an interstate through ticket issued in accordance with duly applicable tariffs lawfully on file with the Interstate Commerce Commission.

11.

Specification of Errors.

Your petitioner urges that:

(1) The Circuit Court of Appeals erred in not holding that the District Court was in error in refusing to direct a verdict in favor of this petitioner and against the plaintiff, Aaron A. B. Chatters.

(2) The Circuit Court of Appeals erred in not holding that the District Court was in error in refusing to give the following charge requested by this petitioner:

> "In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provisions:
>
> 'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'
>
> or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the

plaintiff insofar as said Louisville & Nashville Railroad Company is concerned."

(3) The Circuit Court of Appeals erred in not holding that the District Court was in error in charging the jury that your petitioner and the other connecting carriers involved were engaged in a joint adventure or joint enterprise so that one of them would be liable for an accident happening in connection with the operation of the train while on the route of and in the control, custody and care of one of the others.

12.

That the case, therefore, involves the liability and responsibility of interstate carriers of passengers by railroads, under and by virtue of coupon tickets, which, with the limiting provisions thereon, hereinabove quoted, are used throughout the country in connection with practically every trip made by a person on two or more railroads, and further involves the interpretation and construction of a provision of a ticket in general use throughout the country.

13.

That your petitioner attaches hereto as a part hereof, a certified copy of the entire transcript of record of the case, including the proceedings of the Circuit Court of Appeals.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this

Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that court to certify and send to this Court on a day to be designated, a full and complete transcript of the record of all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Act of Congress, approved March 3, 1891, establishing the Circuit Courts of Appeal, and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as may seem proper and your petitioner will ever pray.

A. M. WARREN,
VICTOR LEOVY,
HARRY McCALL,
GEORGE DENEGRE,
HENRY H. CHAFFE,
JAS. HY. BRUNS,
Attorneys for Louisville & Nashville Railroad Company, Petitioner.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared Harry McCall, who being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner herein; that he is thoroughly familiar with the above

procedeings, and that the facts therein stated are true and correct to the best of his knowledge, information and belief, and that he verily believes them to be true, and that in his opinion the petition is well founded and that the case is one in which the prayer of the petition should be granted by this Court.

HARRY McCALL.

Sworn to and subscribed before me at New Orleans, Louisiana, this 27th day of July, A. D. 1928.

[SEAL.] C. DE LUCAS,
Notary Public.

BRIEF IN SUPPORT OF PETITION.

Assignment No. 1.

The issue raised on this record is, whether an initial interstate carrier by railroad may be held liable at the suit of an interstate passenger for injuries sustained on the line of a second connecting carrier, due to defects in the coach in which the passenger rode developing on the line of the second connecting carrier, which coach was incorporated into the train by the initial carrier at the inception of the passenger's journey, where the coupon ticket contract between such passenger and the initial carrier provided, in accordance wits its tariffs lawfully filed with the Interstate Commerce Commission, that—

> "In selling this ticket and checking baggage thereon the selling carrier acts only as agent and is not responsible beyond its own line."

An answer to this question in the negative, we submit, is to be found in the decisions of this Court, to which we shall presently refer, construing subsections 1 and 7 of Section 6 of the Interstate Commerce Act, as amended February 28, 1920, 41 Stat. at L. 483, which provide that—

> (1) • • • "every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for

transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and *passengers will be carried*," • • • "all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the *passenger*, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.*" (Italic ours.)

(7) "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published

> in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

In view of the plain and unmistakable language of the statute, it hardly needs statement to show that the action of the trial court, affirmed by the Court of Appeals, in entering judgment against the petitioner, under the facts of this case, was in violation of the provisions of the statute, *supra*, as they have been construed by this Court. The reason assigned by the trial court was that—

> • • • "in this case the selling or initial carrier, the selling agency the Louisville & Nashville Railroad Company did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership.
>
> "It made up this train in New Orleans called the Piedmont Limited, a regular train running between New Orleands and Washington, D. C.,

> of coaches under some agreement between two component carriers of that line, that is to say, the Louisville & Nashville Railroad Company and the Atlanta & West Point and the Southern Railway Company. Whatever this agreement might be, this plaintiff would not be bound by it" (Rec., p. 541).

The same view was thus expressed by the Court of Appeals:

> • • • "Under the arrangement for the operation of the Piedmont Limited, the L. & N. undertook the task of cleaning the windows of the car in which plaintiff traveled and of replacing and refastening the screens on those windows in preparation for the journey from New Orleans to Washington. The L. & N. was liable for the injury complained of if its negligent failure properly to perform that task caused or proximately contributed to that injury" (26 Fed. (2nd), 406) (R., 620-621).

The case at bar is, therefore, governed by the decision of this Court in Missouri Pacific R. R. Co. *vs.* Prude, 265 U. S., 99, unless the facts adverted to by the courts below are sufficient to distinguish it from the Prude case, because the validity of the identical provisions of an interstate coupon ticket considered and upheld there is involved here. The transportation service to be performed was that of a common carrier under published tariffs. Neither the carrier nor the passenger could be permitted to engage in any

contract different from that open to the general public or which imposed any additional advantages to the passenger or more extended duties on the part of the carrier. Chicago & Alton R. R. Co. *vs.* Kirby, 225 U. S., 155; Davis *vs.* Cornwell, 264 U. S., 560; Davis *vs.* Henderson, 266 U. S., 92.

The courts below proceeded upon the erroneous assumption that the petitioner waived the provisions of its contract with the passenger limiting its liability to its own line by its conduct in making up the through train by which respondent was to be transported to his destination, and incorporating therein the coach in which he was riding when injured by a defect in one of the window screens, which developed on the line of the second connecting carrier, some 1,200 miles after the train left New Orleans.

But, as this Court said in Georgia, Florida & Alabama Ry. Co. *vs.* Blish Milling Co., 241 U. S., 190:

> • • • "the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

Again this Court said in Keogh *vs.* Chicago & Northwestern Ry. Co., 260 U. S. at page 163:

> "The rights as defined by the tariff can not be varied or enlarged by either contract or tort of the carrier."

In Davis *vs.* Cornwell, *supra*, this Court said:

> "The paramount requirement that tariff provisions be strictly adhere to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery."

The contention that the petitioner waived the provision of the contract limiting its liability to its own line can not be sustained. It could not waive it, either expressly or impliedly. The transportation service to be performed was that of a common carrier under published tariffs. The rule was a part of the tariff. Davis *vs.* Henderson, *supra*.

To hold an initial carrier liable to the passenger for injuries sustained on the line of a connecting carrier, where under the transportation contract and its tariff the liability of the initial carrier is limited to its own line, affects in the most substantial way imaginable "the value of the service rendered the passenger" within the purview of the Statute, *supra;* because an interstate carrier of passengers is under no duty either at common law or under the Carmack Amendment (Paragraph 11 of Section 20, Interstate Commerce Act) to transport or to be responsible for the transportation of the passenger beyond its own line. Railroad Company *vs.* Manufacturing Co., 16 Wallace, 318; Insurance Company *vs.* Railroad Company, 104

U. S., 146; Chicago, Rock Island & Pacific Ry. Co. *vs.* Maucher, 248 U. S., 359-363.

It follows that the L. & N. R. R. Co. can not be held liable under the transportation contract for an injury sustained after the relation of carrier and passenger between it and Chatters had ceased, under the terms of the contract. If this is not true, why did Congress expressly provide:

> "The schedules printed * * * by any such common carrier *shall plainly state the places between which property and passengers will be carried,* * * * all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, *or the value of the service rendered to the passenger,*" * * *. (Italics ours.)

If this provision of the statute does not have direct application to the facts of the case at bar, could a case ever arise between an interstate carrier and its passenger where this provision of the statute would be applicable? The courts below, therefore, in holding the L. & N. R. R. Co. liable for an injury sustained on the line of the Southern made the L. & N. "responsible beyond its own line" in direct and open violation of the transportation contract and the tariff which the statute required it to publish and observe.

If it be contended that the L. & N. R. R. Co. contributed to the accident, not by virtue of any obligation imposed on it by the transportation agreement or

as a common carrier but under its arrangement with the Southern and West Point, whereby the L. & N. undertook to make up the train for the entire journey and to see that the equipment therefor was in good condition, and that the L. & N. incorporated into the train a defective car, in that event our answer is: (1) There was no legal evidence to permit the jury to reach any such conclusion; and (2) by the refusal of the trial court to give the special charge requested, and by the charge actually given, the jury was precluded from considering whether there should be a verdict in favor of the L. & N. R. R. Co.

Assignment No. 2.

The question of adequacy of proof carries with it the propriety or impropriety of the court's action in refusing the request of the L. & N. R. R. Co. for a directed verdict, and will, therefore, be discussed under this head; the other points suggested deal with the charge and will be treated under our second head.

The asserted liability of the L. & N. R. R. Co., under this theory, can not rest to any extent whatever on any duty which the L. & N. may have owed Chatters under the transportation contract, since the accident did not occur on its own line and the relation of carrier and passenger created between them by the transportation contract had ceased, according to its terms; but must depend wholly on its alleged negligence in furnishing a defective car to the succeeding connecting carriers. The only possible basis for holding the L. & N. liable on this theory would be through an appli-

cation of the doctrine of *res ipsa luquitur*. But this can not be, for this doctrine can only be invoked against the party having control of the instrumentality causing the accident.

As said by the Court of Appeals of Kentucky in Louisville & Nashville R. R. Co. *vs.* Mink, 182 S. W., 188; 189 Ky., 394:

> "It is always an element of this rule that the party against whom it is applied must have been in the control and management of the defective instrument causing the accident."

The doctrine of *res ipsa loquitur* has no application where the instrumentality which caused the injury is not shown to be under the management and control of the defendant or the agents or servants of the defendant. Stephens *vs.* Kitchen Lumber Co., 2 S. W. (2nd), 374; 222 Ky., 736.

In Glynn *vs.* Central R. R. of New Jersey, 56 N. E., 698; 175 Mass., 510, the court in an opinion by Mr. Justice Holmes, the Chief Justice of the Supreme Court of Massachusetts, held that a railroad employee, injured by reason of a defect in a car belonging to the defendant, but occurring while the car was in the possession of another railroad, could not recover from the owner of the car. The theory of this decision was that although the car had recently come from the defendant's possession in the condition it was at the time of the accident, it had passed a point where cars coming from other roads were inspected by the plaintiff's employer, and that, therefore, the plaintiff should look to his employer and not to the road which

furnished a defective car to his employer. Missouri, Kansas & Texas R. R. Co. *vs.* Merrill, 70 Pac., 358; 65 Kansas, 436, presented a similar situation with a like result. There the basis of the opinion was that the laws of control over the car and over the servants having it in charge relieved the delivering company from responsibility to the employees of the receiving company.

McNamara *vs.* Boston & Maine Ry. Co. and Central of Vermont R. R. Co., 89 N. E., 131; 202 Mass., 491, was an action for the death of McNamara, an employee of the New York Central R. R. Co., who was killed when the roof of a car of the Central of Vermont Ry. Co. was blown upon him. The Central of Vermont had delivered the car to the B. & M. R. R. Co., which company was using the car for its own purposes at the time of the accident. Affirming a judgment against the B. & M. and in favor of the Central of Vermont, the court said, as directly applicable here:

> "The occurrence of the accident raised no presumption against this defendant because the car was not at the time in its possession or control; and the doctrine of *res ipsa loquitur* is to be applied only against a party who by himself or his servants had at the time the control and management of the appliance or instrumentality whose failure or defective condition was the cause of the accident. Kendall *v.* Boston, 118 Mass., 234, 236, 19 Am. Rep., 446; Wolf *v.* American Tract Society, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241; Schaller *v.* Independent Brewing Assn., 225 Ill. 492, 80 N. E. 334; John-

son *v.* Walsh, 83 Minn. 74, 85 N. W. 910; Higgs *v.* Maynard, Harr. & Ruth, 581.

"The defendant can not be held on the ground that the cause of the accident was a secret defect in the car which might have been found to have been known to the defendant, and that the defendant with such knowledge delivered the car to the Boston & Maine Railroad for transportation over its lines. Louisville, New Albany & Chicago Ry. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Moon *v.* Northern Pacific R. R., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194. As the plaintiff left the cases against this defendant, the purposes of its delivery to the Boston & Maine Railroad had been completed, and the latter road was using the car for its own purposes and against the rights of this defendant." • • •

While two of these decisions involve employee cases, and one a member of the general public, the principle upon which they were decided is clearly applicable to the case at bar, since Chatters' status as to the L. & N. was not different from that of any other member of the general public. The court will not understand from the cases last cited that we assent to the view that the initial carrier could be responsible, under the limitation of the ticket, for anything that happened to Chatters after it surrendered the custody of the train to the Atlanta & West Point R. R. Co. at Montgomery. Nevertheless, it is submitted that an application to the case at bar of the rule of law laid down in the cases last cited would not warrant a finding against the L. & N., because there certainly can be no suggestion that the A. & W. P. R. R. Co. and the

Southern Ry. Co. could not have remedied the defect in the window of the car, if any defect there was. It should be pointed out here that the jury found as a fact and the Court of Appeals held that the

> "Evidence adduced furnished support for findings that the incident to which the injury complained of was attributable would not have occurred" • • • "if the employees who made inspections after the car in which plaintiff was got on the Southern's line, had exercised proper care to ascertain whether the screens then were or were not securely fastened" (R., 621).

In this view of the case, the relation of carrier and passenger having ceased between the L. & N. and Chatters, upon what principle of law, aside from the erroneous theory of partnership and joint venture adopted by the trial court, presently to be discussed, can the L. & N. R. R. Co. be held liable to the Southern's passenger, as to whom the Southern owed the highest degree of practical care—the mere happening of the accident speaking the Southern's negligence? Moreover, the evidence (Rec., 401-524) given on behalf of the Southern Ry. Co. by its employees who made numerous inspections (seven in all) of the train after it was delivered to that line at Atlanta, Ga., and between Atlanta and the point of the accident, the last of which was made at Monroe, Va., only about three hours before the accident, was to the effect that not only was there no defect in the screen of the window in which Chatters rode, but if there had been they would have observed and remedied it.

The only basis for contending that there was any defect in the car was the happening of the accident; but even if it could be argued from this that there was a defect it is not shown how, when or where such defect came into existence, and, particularly, it is not shown what was done with the car by the first connecting carrier, the Atlanta & West Point Ry. Co., to which it was delivered by the L. & N. R. R. Co. at Montgomery, in whose possession it remained until delivered to the Southern Ry. Co. at Atlanta, some six hours later, during which time the train traveled a distance of 175 miles.

As this Court said in Chicago, Milwaukee & St. Paul Ry. Co. *vs.* Coogan, 271 U. S., 472:

> "The record leaves the matter in the realm of speculation and conjecture. That is not enough."

We, therefore, contend on this branch of the case that the request of the petitioner, L. & N. R. R. Co., for a directed verdict was proper and should have been granted, and that in not so holding the Circuit Court of Appeals erred.

Assignment No. 3.

Under this heading we shall discuss together the refusal of the court to give the special charge requested, and also the charge actually given by the court on the same subject, as the two can not logically be separated. The charge requested was as follows:

> "(In the alternative and if No. 1 be not given), I charge you that if you find that the

ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provision:

> "'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'

> "or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff in so far as said Louisville & Nashville Railroad Company is concerned."

By way of approving of the refusal to give this charge, the Circuit Court said:

> "Without explanation, the above set out requested charge, by reason of its recital of the quoted ticket provision and its omission of any mention of the L. & N.'s preparation of the car for its entire journey from New Orleans to Washington, was calculated to divert the jury from the consideration of the question as to due care being or not being used in replacing and refastening the screens before the car left New Orleans" (R., 621).

It is respectfully submitted that the statement of the Circuit Court was unwarranted. The only theory

on which it was sought to hold the L. & N. R. R. Co. was by reason of some alleged fault or negligence on its part in connection with the furnishing of a defective car, which necessarily involved the manner in which the car was inspected and repaired by that company.

We can not understand on what theory the Circuit Court concludes that there should have been incorporated in the requested charge a reference to the fact that the L. & N. R. R. Co. prepared the car for the entire journey from New Orleans to Washington. The Circuit Court overlooked, we respectfully submit, the distinction between the obligation which the L. & N. owed to Chatters and the obligation which the L. & N. might, by special arrangement between them, owe to its connecting carriers. Moreover, Chatters was not a party to the contract or arrangement between the carriers, and the trial court was at pains to emphasize in his charge to the jury that "whatever this agreement might be, this plaintiff would not be bound by it." Not being bound by it, he certainly lacks the necessary privity to rest his right of recovery upon it. Winterbottom *vs.* Wright, 10 Mees. & W., 109, 114; Collins *vs.* Selden, L. R. 3 C. P., 495.

As to the charge actually given, the Circuit Court said:

> "Under the charge given by the court the jury were not warranted in finding against the L. & N. if it exercised due care in closing and fastening the screen which came loose and caused the breaking of the glass whereby plaintiff was injured" (R., 621).

With all due respect, we can see no basis in fact for this statement by the Circuit Court, and in substantiation of our views we invited a careful reading of the charge as a whole. In the first place, there runs through the entire charge the erroneous proposition that the Louisville & Nashville "participated in joint operation of the train, a sort of partnership." A little further on the court said:

> "Under the circumstances as they are shown here, the liability of these two defendant carriers is joint."

And again:

> "Here is a joint enterprise in which these carriers share in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff to deliver him in Washington safely in this particular train."

In the face of this language, no jury would have been justified in rendering a verdict in favor of the plaintiff and against one but not the other of the two defendants sued. The jury was absolutely bound to treat the two defendants as one.

The radical error of the District Court, adopted and approved by the Circuit Court, is that there was a joint obligation on the part of the carriers to deliver Chatters at Washington. There was an agreement between Chatters and the three carriers in question whereunder the Louisville & Nashville undertook to carry Chatters from New Orleans to Montgomery and expressly stipulated that there its liability would end.

There was an agreement between Chatters and the West Point route to carry Chatters from Montgomery to Atlanta, which expressly provided that there the liability of the West Point route would end; and there was finally an agreement on the part of the Southern to carry Chatters from Atlanta to Washington. The undertakings were in no sense joint, but, on the contrary, were wholly separate and successive. The obligation of the second road was not to be performed until after the complete discharge of the obligation of the first. That the error of the District Court was not cured or sought to be cured is demonstrated by the fact that when counsel excepted to those portions of the charge dealing with the alleged joint operation of the two defendants, the court said:

> "A joint undertaking, I think I said, or intended to say, that they were participating in a joint undertaking in the nature of a partnership agreement by which the Piedmont, Ltd., and the coachers therein comprised was operated."

Thus the trial court reiterated his view of the liability in this case, as expressed at page 28 of the Record, when he said:

> "I hold that the cause of action arose out of the contract and relation of the parties as carrier and passenger, and that the whole contract and its performance was a joint undertaking, beginning in Louisiana and ending in the District of Columbia, on the part of both carriers."

A word more is necessary in dealing with the charge of the court to the effect that the transportation of

Chatters was a "joint venture—a sort of partnership" between the carriers engaged therein. In considering the charge in this aspect, the error of the court is made immediately manifest by the court itself when, later in the charge, it correctly declared:

> "There is nothing shown here of the relationship of the parties in the evidence."

Surely if there was a partnership between the carriers, the burden of proving it rested upon Chatters. This burden he did not attempt to carry. Whatever the relationship between the carriers, as between themselves, they were not and could not become partners as to Chatters, under the transportation contract made pursuant to tariffs filed with the Interstate Commerce Commssion, as required by the statute. It is not necessary, therefore, that we should repeat here the arguments heretofore made as to the binding effect of the transportation contract between the parties.

But on common law principles we submit that an arrangement between carriers whereby the passenger is able to complete his journey to destination over the lines of connecting carriers without changing cars at each junction point—nothing more appearing—is not sufficient to make such carriers partners *inter sese* or as to third persons.

In Louisville & Nashville R. R. Co. vs. Sloss-Sheffield Company, 269 U. S., 217, this Court said at page 232:

> "It is true that participation in joint rates does not make connecting carriers partners and

that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. Central R. R. Co. *v.* United States, 257 U. S., 247, 259. Each connecting carrier is liable only for its own act."

We submit that furnishing a through car is not in its legal aspects different from furnishing a through rate. There is no solid or satisfactory basis for distinguishing between a joint rate and a joint car. On this point the case at bar is ruled by the Sloss-Sheffield case, Insurance Company *vs.* Railroad Company, and Railroad Company *vs.* Manufacturing Company, all *supra*.

Conclusion.

It is submited that for the reasons hereinabove assigned this Court should grant the Writ of Certiorari sought and should finally reverse the judgment of the two lower courts and should enter a judgment in favor of this petitioner, dismissing the suit against it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 415

SOUTHERN RAILWAY COMPANY ET AL.,
PETITIONERS,

vs.

AARON A. B. CHATTERS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Southern Railway Company, and of United States Fidelity & Guaranty Company, surety upon its supersedeas writ of error bond in the United States Circuit Court of Appeals for the Fifth Circuit, respectfully represents:

This action was brought in the United States District Court for the Eastern District of *Louisiana* by Aaron A. B. Chatters, a citizen of Louisiana, against Louisville & Nashville Railroad Company, a *Kentucky corporation*, and Southern Railway Company, a *Virginia corporation* (R., 2-6). The plaintiff claimed damages in the sum of $36,087 for personal injuries allegedly sustained while he was being transported as a passenger on a train of Southern Railway Company *in the State of Virginia*, about two hours' journey south of Washington, D. C. (R., 3-6). The plaintiff was then traveling on a *through ticket*, which he *purchased from Louisville & Nashville Railroad Company in New Orleans*, entitling him to transportation from New Orleans, La., to Washington, D. C., over the line of Louisville & Nashville Railroad Company from New Orleans, La., to Montgomery, Ala., over the line of an intermediate carrier from Montgomery, Ala., to Atlanta, Ga., and *over the line of Southern Railway Co. from Atlanta, Ga., to Washington, D. C.* (R., 2-3, 168-9, 251-8).

The accident out of which this suit arose occurred on January 28, 1926, about one or two a. m. (R., 183-4). A screen on a window of the coach in which plaintiff was riding became unlatched and swung against the pane of the adjacent window, breaking the glass (R., 3, 169, 221-2, 233-4). The plaintiff charged that particles of flying glass then entered his eyes and injured them (R., 3-5).

Process against Southern Railway Company was *served upon the agent for service of process desig-*

nated by it in Louisiana, pursuant to appropriate State statutory provisions (R., 12, 27).

That defendant thereupon *excepted to the jurisdiction*, upon the ground that the *cause of action did not arise out of any business done by it in Louisiana*, and that its liability to suit in Louisiana through service upon this statutory agent was *restricted by the State law* to causes of action arising out of business done by it in Louisiana (R., 12-4, 35-8). This exception was overruled in the District Court (R., 17-9, 27-34, 39-40), whereupon that defendant, saving this point, answered to the merits (R., 41-5).

Louisville & Nashville Railroad Company defended the suit upon certain grounds detailed in its own application for certiorari, filed concurrently herewith.

The trial of the case on the merits in the District Court resulted in a verdict and judgment in favor of plaintiff and against both defendants for $3,087 (R., 57-9). From this judgment, both defendants prosecuted writs of error, with supersedeas, to the United States Court of Appeals for the Fifth Circuit (R., 62-98). *Southern Railway Company assigned as error the overruling of its plea to the jurisdiction, and also certain rulings on the admission and exclusion of testimony and the giving of instructions to the jury* (R., 74-81, 83-98).

The Circuit Court of Appeals rendered a judgment of affirmance as to both defendants on June 2, 1928 (R., 616-25). Both defendants filed petitions for a rehear-

ing, which were denied by that court on July 10, 1928 (R., 654).

Southern Railway Company, joined by its surety upon the supersedeas bond, hereby applies for a review by this Court of the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this suit, on writ of certiorari, and petitioners present herewith, as a part of this petition, a transcript of the record in the case, including the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit. Petitioners also present herewith a supporting brief.

The case is reviewable here on certiorari, under the provisions of U. S. C., Title 28, § 347 A (formerly Judicial Code, § 240 A), empowering this Court to review any circuit court of appeals case.

The following reasons are urged as the basis for the issuance of the writ:

(1) *The liability of a foreign corporation to suit in a State, upon a cause of action not arising out of any business done by it in that State, has frequently been the subject of consideration by this Court;* and the rulings below (R., 17-8, 27-33, 39-40, 617-20) upon this jurisdictional questions are *in conflict with the views expressed by this Court* and other courts in numerous cases, including the following:

Mitchell Furniture Co. *vs.* Selden-Breck Construction Co., 257 U. S., 213.

Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533.

Bank of America *vs.* Whitney-Central National Bank, 261 U. S., 171.

General Investment Co. *vs.* Lake Shore & M. S. R. R. Co. *et al.*, 260 U. S., 261, affirming 250 Fed. (6th C. C. A.), 160.

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Simon *vs.* Southern Railway Co., 236 U. S., 115.

Peterson *vs.* C., R. I. & P. Ry. Co., 205 U. S., 364.

Old Wayne Mutual Life Assn. *vs.* McDonough, 204 U. S., 8.

Cancelmo *vs.* Seaboard Air Line Ry., 12 Fed. (2) (Ct. Ap. D. C.), 166.

Allen *vs.* Yellowstone Park Transportation Co., 154 Fed. (C. C. E. D. Mo.), 504.

Maxwell *vs.* Atchison Railroad Co., 34 Fed. (C. C. E. D. Mich.), 286.

Delatour & Marmouget *vs.* Southern Railway Co., 4 La. Ap., 658.

Buscher *vs.* Southern Railway Co., 4 La. Ap., 653.

(2) Since *jurisdiction is an essential element of "due process of law,"* that constitutional question underlies the issues raised by the jurisdictional question in this case. To this effect, see the following authorities:

Simon *vs.* Southern Ry. Co., 236 U. S., 115.

Twining *vs.* New Jersey, 211 U. S., 78.

Old Wayne Mutual Life Assn. *vs.* McDonough, 204 U. S., 8.

Pennoyer *vs.* Neff, 95 U. S., 714.

(3) The action of the District Court in *permitting plaintiff*, as a witness on his own behalf, to testify to *asserted statements made to him by physicians* (who were not summoned as witnesses) concerning his alleged injuries (R., 171-2, 559-61) amounted to a *clear violation of the fundamental principles of the hearsay rule;* and the failure of the Court of Appeals to specifically so hold (R., 623-5) is *at variance with the decisions of this Court and other courts,* and is even at variance with other decisions of that particular court. These decisions are as follows:

Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S., 99.

V. S. & P. Railway Co. *vs.* Godwin, 14 Fed. (2) (5th C. C. A.), 114.

Louisville & Nashville Railroad Co. *vs.* Lynch, 126 S. W., 362; 137 Ky., 696.

Texas Power & Light Co. *vs.* Burger, 166 S. W., (Tex.), 680.

Trott *vs.* C., R. I. & P. Ry. Co., 86 N. W., 33; 115 Iowa, 80.

Johnson *vs.* Powell, 123 Pac., 881; 87 Kan., 142.

Louisville & Nashville R. R. Co. *vs.* Smith, 84 S. W., 755; 27 Ky. L. R., 257.

Zipus *vs.* United Railways & Electric Co., 108 Atl. (Md.), 884.

M., K. & T. Ry. Co. *vs.* Creswell, 78 S. W., 388; 34 Tex. Civ. Ap., 278.

(4) The action of the District Court (R., 323-5, 579-84) in permitting plaintiff, upon the issue of his claim

for loss of earnings as the representative of the Mullins River Lumber Company of Central America, *to introduce in evidence letters from a Central American representative of that concern* (who was not summoned as a witness) containing *asserted statements of fact* tending to support the case of the plaintiff on this issue, amounted to a *clear violation of a fundamental principle of the law of evidence;* and the failure of the Circuit Court of Appeals to so hold (R., 623-4), is *at a variance with the decisions of this Court and other courts* on the subject, including the following:

Leach & Company *vs.* Pierson, 275 U. S., 120.

Great Southern Lumber Co. *vs.* Williams, 17 Fed. (2) (5th C. C. A.), 468, affirmed 48 S. Ct., 417.

V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2) (5th C. C. A.), 114.

Texas Co. *vs.* Brilliant Manufacturing Co., 2 Fed. (2), (3d C. C. A), 1.

Consolidated Grocery Company *et al. vs.* Hammond, 175 Fed. (5th C. C. A.), 641.

Security Trust Co. *vs.* Robb *et al.*, 142 Fed. (3d C. C. A.), 78.

Nevada Co. *vs.* Farnsworth, 102 Fed. (8th C. C. A.), 573.

(5) The action of the Circuit Court of Appeals (R., 621-4) in classifying the two foregoing asserted errors (particularly the former) in the proceedings in the District Court, as *harmless and not prejudicial* error, upon the *speculative assumption and inference* that

the jury finding for the plaintiff on these issues was based one hundred per cent on the properly admitted evidence and nil on the erroneously admitted evidence, *although the properly admitted evidence was concededly conflicting on these issues and although the evidence improperly admitted concededly tended to sustain the case of the plaintiff on these issues.* This classification of error in the admission of testimony as harmless and non-prejudicial, upon such *speculative assumptions and inferences,* is *at variance with the rule stated by numerous decisions of this Court* that such error can be classified as harmless and non-prejudicial only when the court can say that it is "*so clear as to be beyond doubt* that the error *did not and could not have prejudiced* the party's rights" (5 Wall., 808). These cases are as follows:

Williams *vs.* Great Southern Lumber Co., 48 S. Ct., 417 (decided April 18, 1928).

U. S. *vs.* River Rouge Improvement Co. *et al.*, 269 U. S., 411.

Fillippon *vs.* Albion Slate Co., 250 U. S., 76.

Y. & M. V. R. R. Co. *vs.* Mullins, Admx., 249 U. S., 531.

Mexia *vs.* Oliver, 148 U. S., 664.

Columbia & Puget Sound R. R. Co. *vs.* Hawthorne, 144 U. S., 202.

Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S., 99.

Gilmer *vs.* Higley, 110 U. S., 47.

Deery *vs.* Cray, 5 Wall., 795.

(6) The approval by the Circuit Court of Appeals (R., 623-4) of the ruling of the District Court (R., 329,

584-7), denying defendants' motion for a *peremptory instruction* in their favor upon the issue of plaintiff's claim for *loss of earnings* as a representative of the Mullins River Lumber Company. In support of this motion, we cite the following decisions to the effect that, in the Federal courts, when there is *no substantial testimony* supporting the case of the opposite party, the motion for a peremptory instruction should be sustained:

Small Company *vs.* Lamborn & Company, 267 U. S., 248; 45 S. Ct., 300; 69 L. Ed., 597.

Martin *vs.* I. C. R. R. Co., 23 Fed. (2) (5th C. C. A.), 324.

Hardy-Burlingham Mining Co. *vs.* Baker, 10 Fed. (2) (6th C. C. A.), 277.

Noble *vs.* Crane & Co., 169 Fed. (6th C. C. A.), 55.

Minahan *vs.* Grand Trunk Railway, 138 Fed. (6th C. C. A.), 37.

(7) The erroneous ruling of the Circuit Court of Appeals (R., 624), approving the charge of the District Court to the jury, which *imposed a joint responsibility and a joint liability upon connecting carriers*, as to a passenger making a through trip on a through train over several railroad lines on a through coupon ticket (R., 601-6). This ruling upon this important question, involving *the liability of interstate passenger carriers*, is in conflict with the following decisions of this Court:

General Investment Co. *vs.* Lake Shore & M. S. Ry. Co., 260 U. S., 261, affirming 250 Fed. (6th C. C. A.), 160.

Philadelphia & Reading Co. *vs.* McKibben, 243 U. S., 264.

Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S., 364.

Pennsylvania R. R. Co. *vs.* Jones, 155 U. S., 333.

WHEREFORE petitioners pray that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said court had in said cause, to the end that this cause may be reviewed and determined by this Court, as provided by law, and particularly by Section 347 A of Title 28 of the U. S. C., and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may finally be reversed by this Honorable Court; and for such further relief as this Court may deem proper, and your petitioners will ever pray, etc.

SOUTHERN RAILWAY COMPANY,
UNITED STATES FIDELITY & GUARANTY COMPANY.
J. BLANC MONROE,
MONTE M. LEMANN,
WALTER J. SUTHON, Jr.,
Attorneys for Petitioners.
L. E. JEFFRIES,
R. R. PRINCE,
H. O'B. COOPER,
Of Counsel.

STATE OF LOUISIANA,
Parish of Orleans:

Before me, the undersigned authority, a Notary Public duly commissioned and qualified in and for the Parish of Orleans, State of Louisiana, personally came and appeared J. Blanc Monroe, who, being duly sworn, says:

That he is one of the counsel for the petitioners, Southern Railway Company and United States Fidelity & Guaranty Company, and that he knows of the above proceedings had, and that the facts stated in the above petition are true to the best of his knowledge and belief.

J. BLANC MONROE.

Sworn to and subscribed before me at New Orleans, Louisiana, this 18th day of August, 1928.

[SEAL.] WALTER K. LEVERICH,
Notary Public.

FILED
FEB 8 1929
CHARLES ELMORE CROP
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 414

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Petitioner,

versus

AARON A. B. CHATTERS.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Original Brief on Behalf of Louisville & Nashville Railroad Company, Petitioner.

A. M. WARREN,
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IN THE

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OCTOBER TERM, 1928

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AARON A. B. CHATTERS.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Original Brief on Behalf of Louisville & Nashville Railroad Company, Petitioner.

REFERENCE TO OPINIONS OF COURTS BELOW.

The only reported opinion of the Courts below dealing with any of the issues herein presented is that of the Circuit Court of Appeals for the Fifth Circuit, *26 Fed. (2nd.), 403.*

JURISDICTION.

This is an action, originally brought in the District Court of the United States for the Eastern District of Louisiana, by a passenger against the initial carrier and a second connecting carrier for damages sustained by him while travelling on an interstate journey on a through coupon ticket issued by the initial carrier. The amount claimed was $36,087.00, and the judgment herein assailed for $3087.00 (dated April 26, 1927, Rec. pp. 37-38) was affirmed by the Circuit Court of Appeals on June 2, 1928. Rec. p. 424, *26 Fed. (2nd), 403.* Generally speaking, the issues herein presented to this Court are as to the duties and liabilities of an initial carrier to a passenger injured on the line of a second connecting carrier, including also the effect and interpretation of a provision in the coupon ticket, and the tariff under which it was issued. The particular provision of the ticket invoked was to the effect that the selling carrier acts only as agent and is not responsible beyond its own line, your petitioner herein having been the initial carrier.

Under the Commerce Clause of Section 8 of Article 1 of the Constitution, Congress, on February 4, 1887, enacted the Interstate Commerce Act, *24 Statutes at Large, 379*, by which, with the various amendments thereto, the Federal Government has assumed full control over the liability of carriers in interstate commerce. *St. Louis Iron Mountain & Southern Railway Co. v. Starbird, 243 U. S., 592, 595; Missouri Pacific Railroad Company v. Prude, 265 U. S., 99; Georgia, Florida & Alabama Railway Co. v. Blish Milling Co., 241 U. S., 190;* and other decisions referred to in these cases.

A question is, therefore, presented involving the interpretation and effect of a provision of an interstate ticket and the tariff under which it was issued, as well as of the Interstate Commerce Act, of which question, under the authorities herein above cited, this court should take jurisdiction, and should rule definitely thereon.

STATEMENT OF THE CASE.

On June 29, 1926, Aaron A. B. Chatters instituted this suit in the United States District Court for the Eastern District of Louisiana, against your petitioner, Louisville & Nashville Railroad Company, and against Southern Railway Company, for the sum of $36,087.00, with legal interest (5 per cent per annum) from judicial demand until paid; said suit being based on the allegations that the said Chatters, a citizen of the State of Louisiana, on or about January 26, 1925, purchased from your petitioner, a citizen of the State of Kentucky, at New Orleans, Louisiana, a through ticket from New Orleans, Louisiana, to Washington, D. C.; that on the following day at New Orleans, Louisiana, he boarded a regular passenger train operated by your petitioner, on which said train he was transported to Atlanta, and there the train was taken over and placed in the care, custody and control of the Southern Railway Company, a citizen of the States of Kentucky and Virginia; that when the said train reached a point about two hours' travel from Washington, D. C., and while it was still in the care, custody and control of the Southern Railway Company, a screen frame attached to one of the windows in the car in which the said plaintiff was sitting, became loose on one end, and, swinging to the rear, broke a glass

pane in the window of the said car, as a result of which particles of broken glass became lodged in plaintiff's eyes, causing him various injuries aggregating the amount claimed. (Rec. pp. 1-4).

After certain exceptions, immaterial hereto, had been filed by both defendants and had been overruled by the court, and after a supplemental petition, immaterial hereto, had been filed, both defendants filed answers to the said petitions, the answer of your petitioner (Rec. pp. 29-34) averring that for many years there has been through train service between New Orleans, Louisiana, and Washington, D. C., performed by your petitioner, the Atlanta and West Point Railroad Company—the Western Railway of Alabama and the Southern Railway Company in the following manner:

Your petitioner owns and operates along this route a railroad between New Orleans, Louisiana, and Montgomery, Alabama; the Atlanta and West Point Railroad Company—the Western Railway of Alabama, owns and operates a railroad between Montgomery, Alabama, and Atlanta, Georgia, and the Southern Railway Company owns and operates a railroad between Atlanta, Georgia, and Washington, D. C.; the operation of a through train along the said route from New Orleans, Louisiana, to Washington, D. C., is, in no sense of the word, joint between the three railroads named, or any of them; each railroad has full, complete and entire custody and control of the train while on its own railroad, and tickets for a through journey from New Orleans, Louisiana, to Washington, D. C., are the ordinary coupon tickets, there being a separate

coupon for each of the three railroads involved, and these tickets, including the one sold to plaintiff, contain the following provision:

> "In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line."

and defendant expressly pleaded the benefit of this clause in the ticket, and further denied that any car incorporated by it into the train in question was, while in defendant's custody, in a defective or unsafe or dangerous condition; and, further denied that if, at the time of the accident, there was any defect in the said car, such defect was in any wise caused or contributed to by any negligent act or omission on the part of this defendant, its servants, agents or employees.

The case was duly tried before a jury on April 21, 22, 25 and 26, 1927, the Honorable Louis H. Burns, Judge, presiding. The uncontradicted evidence tended to show that plaintiff, Chatters, purchased at New Orleans, Louisiana, from your petitioner, a coupon ticket from New Orleans, Louisiana, to Washington, D. C., which contained the provision hereinabove quoted. The tariff duly filed with the Interstate Commerce Commission, in force and effect in January, 1926, providing passenger rates over the route in question between New Orleans, Louisiana, and Washington, D. C., prescribed that coupon tickets should contain the provision hereinbefore quoted. Plaintiff, travelling on the said ticket, left New Orleans, Louisiana, at five o'clock p. m., on January 26, 1926, in Southern combination car No. 698, which said car belonged to the Southern Railway Company, and remained in the said car until he arrived at

Washington, D. C.; the Louisville & Nashville Railroad Company handled the train of which this car was a part, to Montgomery, Alabama, which was the end of its line on the route to Washington, and there delivered the train to the Atlanta & West Point Railway Company—the Western Railway of Alabama, which handled the said train to Atlanta, Georgia, the end of its line, and there delivered it to the Southern Railway Company. The Southern Railway Company handled the said train, including combination car, No. 698, from Atlanta, Georgia, to Washington, D. C.

At about one o'clock on the morning of January 28, 1926, while the said train was being handled by the Southern Railway Company and was about two hours south of Washington, a window screen on said car, No. 698, flew back and broke a glass in the window behind it, and caused plaintiff, Chatters, the injuries because of which this suit was brought. The said car was regularly used in the through service between New Orleans, Louisiana, and Washington, D. C. On the morning of January 26, 1926, the said car arrived in New Orleans in a train operated by the Louisville & Nashville Railroad Company; was taken to the yards of the said company in the City of New Orleans; was washed and cleaned and was then examined and inspected by two employees of the said Louisville & Nashville Railroad Company, whose testimony was to the effect that they found nothing wrong with the screens of the said car. Any repairs to the said car made by the Louisville & Nashville Railroad Company would have been charged to, and paid by, the Southern Railway Company, the owner of the said car. Shortly before the said car was incorporated

in the train which left New Orleans at five o'clock p. m., on January 26, 1926, it was again inspected by employees of the Louisville & Nashville Railroad Company, whose testimony was to the effect that they discovered nothing the matter with the screens of the said car. The testimony indicated that at Atlanta, Georgia, and at several other subsequent points en route, other inspections of the entire train, including the said car, were made by employees of the Southern Railway Company, whose testimony was to the effect that they discovered nothing the matter with the screens of the said car.

The court was requested to direct a verdict in favor of this petitioner, which request was refused. Then the following alternative request for special instructions to the jury was made by this petitioner:

> "(In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provision:
>
> 'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'
>
> or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against

> the plaintiff insofar as said Louisville & Nashville Railroad Company is concerned" (Rec. p. 379).

which request was likewise refused; and to the refusal of the court to give these requests appropriate and timely exceptions were reserved and bills of exception taken. In its charge to the jury, the court stated, among other things, that:

> "Under the circumstances as they are shown here the liability of these two defendant carriers is joint * * * Here is a joint enterprise in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff to deliver him in Washington safely in this particular train."

This theory of partnership or joint obligation between the two defendants ran throughout the charge, as will be seen by reference to the charge itself, which is set forth in full at pp. 369-378 of the Record.

That to those portions of the charge characterizing the relationship of the carriers as a partnership or joint enterprise, your petitioner duly and timely excepted and reserved a bill of exceptions.

On April 26, 1927, the jury found in favor of the plaintiff and against the two defendant railroads jointly in the sum of $3087.00 (Rec. pp. 37-38), on which said verdict, on the same date, a judgment was entered in favor of the plaintiff and against the two railroad companies jointly and *in solido*, in the sum of $3087.00, with legal interest thereon from the date thereof until paid (Rec. pp. 38-39).

On April 28, 1927, the two defendants filed a motion for a new trial (Rec. p. 39), which motion was heard on May 4, 1927, and on the same day denied (Rec. p. 40), and on May 18, 1927, your petitioner filed its petition for a Writ of Error with *supersedeas*, which petition was on the same day allowed, the *supersedeas* bond being fixed at $5000.00 (Rec. pp. 40-41). That on May 18, 1927, your petitioner assigned the following errors, among others, to the court's action (Rec. pp. 41-46):

III.

"That the Court erred in not directing the jury to find a verdict for this defendant upon the motion made by this defendant at the closing of the taking of evidence, said motion being made not only in the form of a written request for the following special charge:

'I charge you that you should find in favor of the defendant, Louisville & Nashville Railroad Company, and against plaintiff, Aaron A. B. Chatters, in so far as that defendant is concerned,'

but also orally, as follows:

'Mr. McCall:

I move for a directed verdict • • •

IV.

That the Court erred in refusing to give the following charge to the jury requested by this defendant, to-wit:

'(In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff,

Aaron A. B. Chatters, contained the following provision:

In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'

or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff insofar as said Louisville & Nashville Railroad is concerned.'

V.

That the Court erred in charging the jury as follows: • • •

The case is simple. Two railroad companies are sued jointly in this case, because the accident happened while the Plaintiff was a passenger and they were acting as carriers for hire, common carriers, and that relation to the passenger made the circumstances of the case somewhat different from what it would be ordinarily. • • •

In cases such as this where the relation is established of carrier and passenger, the passenger, because of his contract of carriage, need only to show that he was such passenger, and that as such passenger the carrier failed to set him down safely at his destination, and if he shows that, then the burden is upon the carrier to show that it had shown the highest degree of care, skill and foresight, of which as carrier, it was capable. In other words, upon the passenger showing that he was injured,

the burden of proof is upon the carrier to prove what negligence and whose negligence prevented the fulfillment of its contract of carriage to deposit him safely at his destination.

If the defendants fail to satisfactorily explain, in this case—these carriers, two railroad companies, the defendants—if they failed to satisfactorily explain the accident, then negligence will be presumed and they will therefore be liable to the passenger for whatever damage he sustained. • • •

In this case, the burden being upon the plaintiff to prove his quality as a passenger and the fact that he was injured, the first thing to determine is whether he was a passenger, and that seems to be beyond dispute in this case. Was he hurt? Did the carrier fail to deliver him safely to his journey's end? That does not mean they are actual insurers of the passenger, but when the plaintiff has shown he was a passenger, and hurt in transit, and not safely deposited at his destination, the burden is upon the defendant carriers to absolve themselves of negligence, otherwise the negligence will be presumed. • • •

Now, if you determine that this plaintiff, Chatters, was a passenger, and that he was hurt, and the two defendants who are jointly sued, did not exercise that high degree of care, skill and foresight which the law imposes on them in the care of passengers, then the next thing—I say sued two jointly, and right here I will state for this reason: in a suit by a passenger, more especially in a case such as this, on the face of the ticket there are some words printed to the effect that: 'In selling this ticket and checking baggage hereon, the selling carrier acts only as agent and is not responsible beyond its own line,' would be binding upon the passenger, but in this case the selling or initial carrier, the sell-

ing agency, the Louisville & Nashville Railroad Company, did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership.

It made up this train in New Orleans called the Piedmont Limited, a regular train running between New Orleans and Washington, D. C., of coaches under some agreement between two component carriers of that line, that is to say the Louisville & Nashville and the Atlanta & West Point and the Southern Railway Company. Whatever this agreement might be, this plaintiff would not be bound by it, but the Louisville & Nashville Railroad Company made up that train, set it in motion here, the plaintiff got aboard it as a passenger, sat in a particular coach, called a combination coach, the description of which you well know, staying in that coach continuously throughout the trip across the rails of the Louisville & Nashville Railroad and intermediate lines, and finally the Southern Railway within an hour or two of his destination when this accident happened by which a glass was broken and the flying debris causing the injury.

Under the circumstances as they are shown here the liability of these two defendant carriers is joint. We can ignore for all practical purposes the intermediate carrier. There is nothing shown here of the relationship of the parties in the evidence, more especially the relationship of the Atlanta & West Point, the intermediate carrier, and we are not concerned with it for the purpose of this case.

Here is a joint enterprise in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff to deliver him in Washington safely in this particular train.

Now the evidence shows that the local or original carrier was bound and did participate in the inspection of that train. They were responsible for its good condition, responsible for furnishing the train made up in a safe manner, responsible to its passengers and with its codefendants to do and perform its part in the inspection and preparation of sending out that train with the highest degree of care, skill and foresight and that obligation continued. The Southern Railway Company on receiving this train was likewise obligated to this passenger, and to escape liability the burden was upon the Louisville & Nashville Railroad Company to show positively that this equipment, this latch on this particular screen in this case, was in good order when it left here, not worn, or in some other manner affected by the weather and age, and shift the burden thereby to the Southern Railway to show positively to your satisfaction that it used the highest degree of care and prudence in the handling of the train after it received it.

The evidence here as you heard it, tends to show while numerous inspections were no doubt made by both these defendant railroad companies, they resulted in nothing. They resulted in no discovery of this defect in the screen which flew open and caused this alleged accident, and therefore between themselves neither one has shifted the burden upon the other.

Now, gentlemen, the case as I see it is very simple and as I have indicated, you should decide first whether or not these two defendant railroad companies have satisfactorily explained the burden as put upon them as I explained, and if not, then decide how much damage you should award to the plaintiff."

and on the same day (May 18, 1927), your petitioner filed a *supersedeas* bond in the sum of $5,000 (Rec. p. 46).

On July 6, 1927 (this being within the time allowed for that purpose by the court, as extended), your petitioner filed four bills of exception. The first two of these (Rec. pp. 64-66 and 378-369) dealt with failure of Trial Judge to give a directed verdict, and in connection therewith the entire record of the proceedings in the District Court (Rec. pp. 66-368) was brought up. The third bill of exceptions (Rec. pp. 378-381) dealt with the refusal of the court to give the special charge herein above quoted in full, and the fourth bill of exceptions (Rec. pp. 381-385) attacked those portions of the charge actually given by the trial court, characterizing the relationship of the defendant railroad companies as a joint adventure or joint enterprise.

The said cause was entered and docketed in the United States Circuit Court of Appeals for the Fifth Circuit, being entitled "Louisville & Nashville Railroad Company and Southern Railway Company, Plaintiff in Error, v. Aaron A. B. Chatters, Defendant in Error," and numbered 5169 of said docket, and on March 20, 1928, was heard in the said Court, and on June 2, 1928, a decree was entered, affirming the judgment of the District Court (Rec. p. 424). The opinion of the Circuit Court is reported, *26 Fed. (2nd), 403.* Your petitioner, in due course, applied to the said Court of Appeals for a rehearing, which application was on July 10, 1928, denied (Rec. p. 433).

Application for Writ of Certiorari was thereupon duly filed in this Court, and was, on October 15, 1928, granted.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in not holding that the District Court was in error in refusing to direct a verdict in favor of this petitioner and against the plaintiff, Aaron A. B. Chatters.

(2) The Circuit Court of Appeals erred in not holding that the District Court was in error in refusing to give the following charge requested by this petitioner:

> "(In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. B. Chatters, contained the following provisions:
>
> > 'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'
>
> or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff insofar as said Louisville & Nashville Railroad Company is concerned."

(3) The Circuit Court of Appeals erred in not holding that the District Court was in error in charging the jury that your petitioner and the other connecting carriers involved were engaged in a joint adventure or joint

enterprise so that one of them would be liable for an accident happening in connection with the operation of the train while on the route of and in the contract, custody and care of one of the others.

ARGUMENT.

Assignment No. 1.

(A)

The issue raised on this record is, whether an initial interstate carrier by railroad may be held liable at the suit of an interstate passenger for injuries sustained on the line of a second connecting carrier, due to defects in the coach in which the passenger rode developing on the line of the second connecting carrier, which coach was incorporated into the train by the initial carrier at the inception of the passenger's journey, where the coupon ticket contract between such passenger and the initial carrier provided, in accordance with its tariffs lawfully filed with the Interstate Commerce Commission, that:

> "In selling this ticket and checking baggage thereon the selling carrier acts only as agent and is not responsible beyond its own line."

An answer to this question in the negative, we submit, is to be found in the decisions of this Court, to which we shall presently refer, construing subsections 1 and 7 of Section 6 of the Interstate Commerce Act, as amended February 28, 1920, 41 Stat., at L. 483, which provide that:

> (1) * * * "every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep

open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and **passengers will be carried,**" * * * "all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the **passenger,** shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. **The provisions of this section shall apply to all traffic, transportation, and facilities** defined in this Act."

(7) "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in con-

nection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

In view of the plain and unmistakable language of the statute, it hardly needs statement to show that the action of the trial court, affirmed by the Court of Appeals, in entering judgment against your petitioner, under the facts of this case, was in violation of the provisions of the statute, *supra*, as they have been construed by this Court. The reason assigned by the trial court was that:

• • • "in this case the selling or initial carrier, the selling agency the Louisville & Nashville Railroad Company did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership.

"It made up this train in New Orleans called the Piedmont Limited, a regular train running between New Orleans and Washington, D. C., of coaches under some agreement between two component carriers of that line, that is to say, the Louisville & Nashville Railroad Company and the Atlanta & West Point and the Southern Railway Company. Whatever this agreement might be, this plaintiff would not be bound by it." (Rec. pp. 372-3).

The same view was thus expressed by the Court of Appeals:

• • • "Under the arrangement for the operation of the Piedmont Limited, the L. & N. un-

dertook the task of cleaning the windows of the car in which plaintiff traveled and of replacing and refastening the screens on those windows in preparation for the journey from New Orleans to Washington. The L. & N. was liable for the injury complained of if its negligent failure properly to perform that task caused or proximately contributed to that injury." [*26 Fed. (2nd) 406*]. Rec. 428-9).

The case at bar is, therefore, governed by the decision of this Court in *Missouri Pacific R. R. Co. v. Prude, 265 U. S., 99*, unless the facts adverted to by the courts below are sufficient to distinguish it from the *Prude* case, because the validity of the identical provisions of an interstate coupon ticket considered and upheld there is involved here. The transportation service to be performed was that of a common carrier under published tariffs. Neither the carrier nor the passenger could be permitted to engage in any contract different from that open to the general public or which imposed any additional advantages to the passenger or more extended duties on the part of the carrier.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S., 155.
Davis v. Cornwell, 264 U. S., 560.
Davis v. Henderson, 266 U. S., 92.

The courts below proceeded upon the erroneous assumption that the petitioner waived the provisions of its contract with the passenger limiting its liability to its own line by its conduct in making up the through train by which respondent was to be transported to his destination, and incorporating therein the coach in which he was riding when injured by a defect in one of the window screens, which developed on the line of the second connecting carrier, some 1,200 miles after the train left New Orleans.

But, as this Court said in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S., 190, 197:*

> • • • "the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

Again this Court said in *Keogh v. Chicago & Northwestern Ry. Co., 260 U. S., at page 163:*

> "The rights as defined by the tariff can not be varied or enlarged by either contract or tort of the carrier."

In *Davis v. Cornwell, supra,* this Court said:

> "The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery."

The contention that your petitioner waived the provision of the contract limiting its liability to its own line cannot be sustained. It could not waive it, either expressly or impliedly. The transportation service to be performed was that of a common carrier under published tariffs. The rule was a part of the tariff. *Davis v. Henderson, supra.*

To hold an initial carrier liable to the passenger for injuries sustained on the line of a connecting carrier, where

under the transportation contract and its tariff the liability of the initial carrier is limited to its own line, affects in the most substantial way imaginable "the value of the service rendered the passenger" within the purview of the Statute, *supra;* because an interstate carrier of passengers is under no duty either at common law or under the Carmack Amendment (Paragraph 11 of Section 20, Interstate Commerce Act) to transport or to be responsible for the transportation of the passenger beyond its own line.

Railroad Company v. Manufacturing Co., 16 Wallace, 318.

Insurance Company v. Railroad Company, 104 U. S., 146.

Chicago, Rock Island & Pacific Ry. Co. v. Maucher, 248 U. S., 359-363.

It follows that the L. & N. R. R. Co. cannot be held liable under the transportation contract for an injury sustained after the relation of carrier and passenger between it and Chatters had ceased, under the terms of the contract. If this is not true, why did Congress expressly provide:

> "The schedules printed * * * by any such common carrier **shall plainly state the places between which property and passengers will be carried,** * * * all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, **or the value of the service rendered to the passenger,"** * * *

If this provision of the statute does not have direct application to the facts of the case at bar, could a case ever arise between an interstate carrier and its passenger where

this provision of the statute would be applicable? The courts below, therefore, in holding the L. & N. R. R. Co. liable for an injury sustained on the line of the Southern made the L. & N. "responsible beyond its own line" in direct and open violation of the transportation contract and the tariff which the statute required it to publish and observe.

If it be contended that the L. & N. R. R. Co. contributed to the accident, not by virtue of any obligation imposed on it by the transportation agreement or as a common carrier, but under its arrangement with the Southern and West Point, whereby the L. & N. undertook to make up the train for the entire journey and to see that the equipment therefor was in good condition, and that the L. & N. incorporated into the train a defective car, in that event our answer is: (1) There was no legal evidence to permit the jury to reach any such conclusion; and (2) by the refusal of the trial court to give the special charge requested and by the charge actually given, the jury was precluded from considering whether there should be a verdict in favor of the L. & N. R. R. Co.

(B)

The question of adequacy of proof carries with it the propriety or impropriety of the court's action in refusing the request of the L. & N. R. R. Co. for a directed verdict, and will, therefore, be discussed under this subhead; the other points suggested deal with the charge and will be treated under our next head.

The asserted liability of the L. & N. R. R. Co., under this theory, cannot rest to any extent whatever on any duty which the L. & N. may have owed Chatters under the transportation contract, since the accident did not occur on its own line and the relation of carrier and passenger created between them by the transportation contract had ceased, according to its terms; but must depend wholly on its alleged negligence in furnishing a defective car to the succeeding connecting carriers. The only possible basis for holding the L. & N. liable on this theory would be through an application of the doctrine of *res ipsa loquitur*. But this cannot be, for this doctrine can only be invoked against the party having control of the instrumentality causing the accident.

As said by the Court of Appeals of Kentucky in *Louisville & Nashville R. R. Co. v. Mink, 182 S. W., 188; 189 Ky., 394:*

> "It is always an element of this rule that the party against whom it is applied must have been in the control and management of the defective instrument causing the accident."

The doctrine of *res ipsa loquitur* has no application where the instrumentality which caused the injury is not shown to be under the management and control of the defendant or the agents or servants of the defendant.

Stephens v. Kitchen Lumber Co., 2 S. W. (2nd), 374; 222 Ky., 736.

In *Glynn v. Central R. R. of New Jersey, 56 N. E., 698; 175 Mass., 510,* the court in an opinion by Mr. Justice Holmes, then Chief Justice of the Supreme Court of Massa-

chusetts, held that a railroad employee, injured by reason of a defect in a car belonging to the defendant, but occurring while the car was in the possession of another railroad, could not recover from the owner of the car. The theory of this decision was that although the car had recently come from the defendant's possession in the condition it was at the time of the accident, it had passed a point where cars coming from other roads were inspected by the plaintiff's employer, and that, therefore, the plaintiff should look to his employer and not to the road which furnished the defective car to his employer. *Missouri, Kansas & Texas R. R. Co. v. Merrill, 70 Pac., 358; 65 Kansas, 436,* presented a similar situation with a like result. There the basis of the opinion was that the loss of control over the car and over the servants having it in charge relieved the delivering company from responsibility to the employees of the receiving company.

McNamara v. Boston & Maine Ry. Co. and Central of Vermont R. R. Co., 89 N. E., 131; 202 Mass., 491, was an action for the death of McNamara, an employee of the New York Central R. R. Co., who was killed when the roof of a car of the Central of Vermont Ry. Co. was blown upon him. The Central of Vermont had delivered the car to the Boston & Maine R. R. Co., which company was using the car for its own purposes at the time of the accident. Affirming a judgment against the Boston & Maine and in favor of the Central of Vermont, the court said, as directly applicable here:

> "The occurrence of the accident raised no presumption against this defendant because the car was not at the time in its possession or control; and

the doctrine of *res ipsa loquitur* is to be applied only against a party who by himself or his servants had at the time the control and management of the appliance or instrumentality whose failure or defective condition was the cause of the accident. Kendall v. Boston, 118 Mass., 234, 236, 19 Am. Rep., 446; Wolf v. American Tract Society, 164 N. Y., 30, 58 N. E. 31, 51 L. R. A. 241; Schaller v. Independent Brewing Assn., 225 Ill., 492, 80 N. E. 334; Johnson v. Walsh, 83 Minn., 74, 85 N. W. 910; Higgs v. Maynard, Harr. & Ruth, 581.

"The defendant can not be held on the ground that the cause of the accident was a secret defect in the car which might have been found to have been known to the defendant, and that the defendant with such knowledge delivered the car to the Boston & Maine Railroad for transportation over its lines. Louisville, New Albany & Chicago Ry. v. Bates, 146 Ind. 564, 45 N. E. 108; Moon v. Northern Pacific R. R., 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194. As the plaintiff left the cases against this defendant, the purposes of its delivery to the Boston & Maine Railroad had been completed, and the latter road was using the car for its own purposes and against the rights of this defendant."

* * *

While two of these decisions involve employee cases, and one a member of the general public, the principle upon which they were decided is clearly applicable to the case at bar, since at the time of the accident Chatters' status as to the L. & N. was not different from that of any other member of the general public. The court will not understand from the cases last cited that we assent to the view that the initial carrier could be responsible, under the limitation of the ticket, for anything that happened to Chat-

ters after it surrendered the custody of the train to the Atlanta & West Point R. R. Co., at Montgomery. Nevertheless, it is submitted that an application to the case at bar of the rule of law laid down in the cases last cited would not warrant a finding against the L. & N., because there certainly can be no suggestion that the A. & W. P. R. R. Co. and the Southern Ry. Co. could not have remedied the defect in the window of the car, if any defect there was. It should be pointed out here that the jury found as a fact and the Court of Appeals held that the

> "Evidence adduced furnished support for findings that the incident to which the injury complained of was attributable would not have occurred" • • • "if the employees who made inspections after the car in which plaintiff was got on the Southern's line, had exercised proper care to ascertain whether the screens then were or were not securely fastened." (Rec. p. 429).

In this view of the case, the relation of carrier and passenger having ceased between the L. & N. and Chatters, upon what principle of law, aside from the erroneous theory of partnership and joint venture adopted by the trial court, presently to be discussed, can the L. & N. R. R. Co. be held liable to the Southern's passenger, as to whom the Southern owed the highest degree of practical care—the mere happening of the accident speaking the Southern's negligence? Moreover, the evidence (Rec. pp. 401-524) given on behalf of the Southern Ry. Co. by its employees who made numerous inspections (seven in all) of the train after it was delivered to that line at Atlanta, Ga., and between Atlanta and the point of the accident, the last of which was made at Monroe, Va., only about three hours

before the accident, was to the effect that not only was there no defect in the screen of the window in which Chatters rode, but if there had been they would have observed and remedied it.

The only basis for contending that there was any defect in the car was the happening of the accident; but even if it could be argued from this that there was a defect, it is not shown how, when or where such defect came into existence, and, particularly, it is not shown what was done with the car by the first connecting carrier, the Atlanta & West Point Ry. Co., to which it was delivered by the L. & N. R. R. Co. at Montgomery, in whose possession it remained until delivered to the Southern Ry. Co. at Atlanta, some six hours later, during which time the train traveled a distance of 175 miles.

As this Court said in *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S., 472:*

> "The record leaves the matter in the realm of speculation and conjecture. That is not enough."

We, therefore, contend on this branch of the case that the request of the petitioner, L. & N. R. R. Co., for a directed verdict was proper and should have been granted, and that in not so holding the Circuit Court of Appeals erred.

ASSIGNMENTS NOS. 2 AND 3.

Under this heading we shall discuss together the refusal of the court to give the special charge requested, and also the charge actually given by the court on the same

subject, as the two cannot logically be separated. The charge requested was as follows:

> "(In the alternative and if No. 1 be not given), I charge you that if you find that the ticket sold by the defendant, Louisville & Nashville Railroad Company, as initial carrier, to the plaintiff, Aaron A. A. B. Chatters, contained the following provision:
>
> "'In selling this ticket and checking baggage thereon, the selling carrier acts only as agent and is not responsible beyond its own line.'
>
> "or substantially that language, and if you find that the accident complained of occurred on a part of the through route operated by a railroad other than the Louisville & Nashville Railroad Company, and if you find that there was no fault or negligence of the Louisville & Nashville Railroad Company, causing or contributing to the said accident, then and in that event your verdict should be in favor of the Louisville & Nashville Railroad Company and against the plaintiff in so far as said Louisville & Nashville Railroad Company is concerned."

By way of approving of the refusal to give this charge, the Circuit Court said:

> "Without explanation, the above set out requested charge, by reason of its recital of the quoted ticket provision and its omission of any mention of the L. & N.'s preparation of the car for its entire journey from New Orleans to Washington, was calculated to divert the jury from the consideration of the question as to due care being or not being used in replacing and refastening the screens before the car left New Orleans." (Rec. p. 429).

It is respectfully submitted that the statement of the Circuit Court was unwarranted. The only theory on

which it was sought to hold the L. & N. R. R. Co. was by reason of some alleged fault or negligence on its part in connection with the furnishing of a defective car, which necessarily involved the manner in which the car was inspected and repaired by that company.

We cannot understand on what theory the Circuit Court concludes that there should have been incorporated in the requested charge a reference to the fact that the L. & N. R. R. Co. prepared the car for the entire journey from New Orleans to Washington. The Circuit Court overlooked, we respectfully submit, the distinction between the obligation which the L. & N. owed to Chatters and the obligation which the L. & N. might, by special arrangement between them owe to its connecting carriers. Moreover, Chatters was not a party to the contract or arrangement between the carriers, and the trial court was at pains to emphasize in his charge to the jury that "whatever this agreement might be, this plaintiff would not be bound by it." Not being bound by it, he certainly lacks the necessary privity to rest his right of recovery upon it.

Winterbottom v. Wright, 10 Mees. & W., 109, 114.

Collins v. Selden, L. R. 3 C. P., 495.

As to the charge actually given, the Circuit Court said:

> "Under the charge given by the court the jury were not warranted in finding against the L. & N. if it exercised due care in closing and fastening the screen which came loose and caused the breaking of the glass whereby plaintiff was injured." (Rec. p. 429).

With all due respect, we can see no basis in fact for this statement by the Circuit Court, and in substantiation of our views we invite a careful reading of the charge as a whole. In the first place, there runs through the entire charge the erroneous proposition that the Louisville & Nashville "participated in joint operation of the train, a sort of partnership." A little further on the court said:

> "Under the circumstances as they are shown here, the liability of these two defendant carriers is joint."

And again:

> "Here is a joint enterprise in which these carriers share in the delivery of this passenger by reason of the manner in which this transportation was handled. They assumed the obligation jointly with this plaintiff to deliver him in Washington safely in this particular train."

In the face of this language, no jury would have been justified in rendering a verdict in favor of the plaintiff and against one but not the other of the two defendants sued. The jury was absolutely bound to treat the two defendants as one.

The radical error of the District Court, adopted and approved by the Circuit Court, is that there was a joint obligation on the part of the carriers to deliver Chatters at Washington. There was an agreement between Chatters and the three carriers in question whereunder the Louisville & Nashville undertook to carry Chatters from New Orleans to Montgomery and expressly stipulated that there its liability would end. There was an agreement be-

tween Chatters and the West Point route to carry Chatters from Montgomery to Atlanta, which expressly provided that there the liability of the West Point route would end; and there was finally an agreement on the part of the Southern to carry Chatters from Atlanta to Washington. The undertakings were in no sense joint, but, on the contrary, were wholly separate and successive. The obligation of the second road was not to be performed until after the complete discharge of the obligation of the first. That the error of the District Court was not cured or sought to be cured is demonstrated by the fact that when counsel excepted to those portions of the charge dealing with the alleged joint operation of the two defendants, the court said:

> "A joint undertaking, I think I said, or intended to say, that they were participating in a joint undertaking in the nature of a partnership agreement by which the Piedmont Ltd., and the coaches therein comprised was operated."

Thus the trial court reiterated his view of the liability in this case, as expressed at page 18 of the record, when he said:

> "I hold that the cause of action arose out of the contract and relation of the parties as carrier and passenger, and that the whole contract and its performance was a joint undertaking, beginning in Louisiana and ending in the District of Columbia, on the part of both carriers."

A word more is necessary in dealing with the charge of the court to the effect that the transportation of Chatters was a "joint venture—a sort of partnership" between the carriers engaged therein. In considering the charge

in this aspect, the error of the court is made immediately manifest by the court itself when, later in the charge, it correctly declared:

> "There is nothing shown here of the relationship of the parties in the evidence."

Surely if there was a partnership between the carriers, the burden of proving it rested upon Chatters. This burden he did not attempt to carry. Whatever the relationship between the carriers, as between themselves, they were not and could not become partners as to Chatters, under the transportation contract made pursuant to tariffs filed with the Interstate Commerce Commission, as required by the statute. It is not necessary, therefore, that we should repeat here the arguments heretofore made as to the binding effect of the transportation contract between the parties.

But on common law principles we submit that an arrangement between carriers whereby the passenger is able to complete his journey to destination over the lines of connecting carriers without changing cars at each junction point—nothing more appearing—is not sufficient to make carriers partners *inter sese* or as to third persons.

In *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Company, 269 U. S., 217*, this Court said at page 232:

> "It is true that participation in joint rates does not make connecting carriers partners and that each does not become liable like a partner for every tort of any of the others engaged in the common enterprise. Central R. R. Co. v. United States, 257 U. S., 247, 259. Each connecting carrier is liable only for its own act."

We submit that furnishing a through car is not in its legal aspects different from furnishing a through rate. There is no solid or satisfactory basis for distinguishing between a joint rate and a joint car. On this point, the case at bar is ruled by the *Sloss-Sheffield* case, *Insurance Company v. Railroad Company*, and *Railroad Company v. Manufacturing Company*, all *supra*.

CONCLUSION.

It is submitted that for the reasons hereinabove assigned this Court should reverse the judgment of the two lower courts and should enter a judgment in favor of this petitioner, dismissing the suit against it.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 415

SOUTHERN RAILWAY COMPANY ET AL.,
PETITIONERS,

vs.

AARON A. B. CHATTERS, RESPONDENT.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May it please the Court:

Jurisdictional Grounds.

Under the provisions of United States Code, Title 28, § 347 *a* (formerly Judicial Code, § 240 *a*), we seek

a certiorari on behalf of one of two defendants to correct a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (R., 616-25), rendered on June 2, 1928 (26 Fed. (2), 403), affirming a verdict and judgment for plaintiff and against both defendants (R., 57-9) in the United States District Court for the Eastern District of Louisiana, in the principal sum of $3,087. This judgment of the Circuit Court of Appeals became final on July 10, 1928, through the denial of petitions for rehearing by each defendant (R., 654).

The other defendant sued and condemned herein (Louisville & Nashville Railroad Company) is filing concurrently herewith its petition for a certiorari.

The points urged in this application include both a *plea to the jurisdiction* (17 Fed. (2), 305) and also certain questions *pertaining to the merits* of the case. This Court is asked to review the case because of the *importance of the points* involved; because of the *patently erroneous character of the rulings* of Circuit Court of Appeals; and because of the *several conflicts* between these rulings and the pertinent decisions of this Court.

The suit is an action by a passenger for personal injuries, brought against both the initial carrier (Louisville & Nashville Railroad Company) and a connecting carrier (petitioner) on whose line the accident occurred. Recovery was had below against both defendants.

The jurisdictional question herein concerns the liability of a foreign corporation to suit in a Federal

District Court, through service of process upon the agent designated by it pursuant to appropriate State statutory provisions, when (1) the cause of action does not arise out of any business done by this foreign corporation within that State, and (2) the State rule of law is that an implication of consent to be sued results from this designation of an agent for service of process only quoad causes of action arising out of business done within that State. The decisions of this Court which we cite as *conflicting* with the rulings below in the present case on these issues, include the following:

Mitchell Furniture Co. *vs.* Selden-Breck Construction Co., 257 U. S., 213.

Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533.

Bank of America *vs.* Whitney-Central National Bank, 261 U. S., 171.

General Investment Co. *vs.* Lake Shore & M. S. R. R. Co. *et al.*, 260 U. S., 261, affirming 250 Fed. (6th C. C. A.), 160.

Philadelphia & Reading *vs.* McKibben, 243 U. S., 264.

Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93.

Simon *vs.* Southern Ry. Co., 236 U. S., 115.

Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S., 364.

Old Wayne Mutual Life Ass'n *vs.* McDonough, 204 U. S., 8.

Since *jurisdiction is an essential element of "due process of law,"* this plea to the jurisdiction raises a constitutional question. This Court has so held in the following cases:

Simon *vs.* Southern Ry. Co., 236 U. S., 115.
Twining *vs.* New Jersey, 211 U. S., 78.
Old Wayne Mutual life Ass'n *vs.* McDonough, 204 U. S., 8.
Pennoyer *vs.* Neff, 95 U. S., 714.

The rulings on the merits of which we complain include: (1) Several *clear violations of the hear-say rule* in the admission of testimony on behalf of the plaintiff upon the trial in the District Court, and the failure of the Circuit Court of Appeals to specifically classify these rulings as erroneous; (2) the action of the Circuit Court of Appeals in *treating these asserted errors as harmless and non-prejudicial*, upon the *speculative assumption and inference* that the testimony thus erroneously admitted had no effect whatsoever upon the jury findings in favor of plaintiff, *although the properly admitted testimony was concededly conflicting and although the testimony improperly admitted concededly tended to sustain the jury findings in favor of plaintiff*—a ruling in conflict with the jurisprudence of this Court to the effect that error can be classified as harmless and non-prejudicial only when it is *"so clear as to be beyond doubt"* that the error did not and could not have prejudiced the party's rights (5 Wall., 808); and (3) the denial of defendant's motion to withdraw from the jury an item of

the plaintiff's claim *not supported by any substantial testimony;* and (4) the erroneous ruling *imposing a joint responsibility and a joint liability upon connecting carriers,* as to a passenger making a through trip in a through train over several railroad lines on a through coupon ticket. The decisions of this Court which we cite as conflicting with the rulings in the present case on these issues, include the following:

(1) Leach & Company *vs.* Pierson, 275 U. S., 120.
Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S., 99.

(2) Williams *vs.* Great Southern Lumber Co., 48 S. Ct. 417 (decided April 18, 1928).
U. S. *vs.* River Rouge Improvement Co. et al., 269 U. S., 411.
Fillippon *vs.* Albion Slate Co., 250 U. S., 76.
Y. & M. V. R. R. Co. *vs.* Mullins, Admx., 249 U. S., 531.
Mexia *vs.* Oliver, 148 U. S., 664.
Columbia & Puget Sound R. R. Co. *vs.* Hawthorne, 144 U. S., 202.
Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S., 99.
Gilmer *vs.* Higley, 110 U. S., 47.
Deery *vs.* Cray, 5 Wall., 795.

(3) Small *vs.* Lamborn & Co., 267 U. S., 248.

(4) General Investment Co. *vs.* Lake Shore & M. S. Ry. Co., 260 U. S., 261, affirming 250 Fed. (6th C. C. A), 160.
Philadelphia & Reading Co. *vs.* McKibben, 243 U. S., 264.

Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S., 364.

Pennsylvania R. R. Co. *vs.* Jones, 155 U. S., 333.

In addition to the *conflicts* between the rulings herein and the decisions of this Court cited above, we also point out hereinafter certain *conflicts* between these rulings and both the general Federal jurisprudence and the general State jurisprudence upon certain issues involved in this case.

Statement of Case.

This action was instituted in the United States District Court for the *Eastern District of Louisiana* by Chatters, a citizen of Louisiana, against the Louisville & Nashville Railroad Company, a Kentucky corporation, and the Southern Railway Company, a *Virginia corporation* (R., 2-6). For the sake of brevity, we will refer to the defendants as the "L. & N." and the "Southern," respectively.

The plaintiff claimed damages in the sum of $36,087, on account of alleged injuries to his eyes by particles of glass from a broken window pane in a railroad car. *This accident occurred at a point in Virginia, on the line of the Southern.*

The plaintiff, on the trip in question, travelled from New Orleans, La., to Washington, D. C., *on a through coupon ticket purchased by him from the L. & N. in New Orleans*, which entitled him to transportation over that line from New Orleans to Montgomery, Ala., over the line of the Atlanta & West Point Rail-

road Company and the Western of Alabama Railway Company (hereinafter collectively termed the "A. & W. P.") from Montgomery, Ala., to Atlanta, Ga., and *over the line of the Southern from Atlanta, Ga., to Washington, D. C.* (R., 2-3, 168-9, 251-8). He made the entire trip on a *through train* called the "Piedmont Limited," operated over these railroad lines between New Orleans and Washington through the intermediate points just mentioned (R., 168-9, 224, 290-9).

The accident in question occurred in Virginia, on the Southern's line, about two hours' journey south of Washington (R., 3, 219, 234). An outside screen on one window of the car in which plaintiff was riding became detached and swung against the glass of an adjacent window, breaking it (R., 3, 169, 221-2, 233-4).

Process against the Southern was *served upon the agent designated by it pursuant to Louisiana statutory provisions* (R., 12). The Southern *excepted to the jurisdiction*, upon the ground that the cause of action against it *did not arise out of any business done by it in Louisiana*, and that, as a foreign corporation which has designated an agent for service of process in Louisiana, it is *suable there only upon causes of action arising out of business done by it within that State* (R., 12-4, 18-9, 35-7). The evidence shows that while the Southern has designated an agent for service of process in Louisiana and maintains an office there for the solicitation of freight and passenger business for its railroad lines in other States, *it does not itself own or operate any railroad lines in that*

State (R., 104-50). This exception was overruled by the District Court (R., 17-8, 27-34, 39-40).

The L. & N. interposed certain special defenses which will be fully detailed in the application for certiorari filed concurrently herewith by that defendant.

The case was tried before a jury, which returned a verdict for $3,087 against both defendants (R., 57-8), after plaintiff had waived his claim for $25,000 for alleged permanent injuries to his eyes (R., 329). A motion for a new trial was denied (R., 59-61). Both defendants then prosecuted writs of error to the United States Court of Appeals for the Fifth Circuit (R., 62-3, 73-4). The Southern assigned as error the overruling of its exception to the jurisdiction, as well as the other rulings herein complained of (R., 74-81, 83-98). The L. & N. joined in some of these assignments (R., 83-98) and assigned other errors peculiar to its own defenses (R., 64-71).

The circuit court of appeals held that no reversible error had been committed as to either defendant, and affirmed the judgment (R., 616-25). Motions for rehearing by both defendants (R., 627-653) were denied (R., 654).

Errors Urged.

The errors relied on by petitioners are as follows:

(1) *The overruling of the plea to jurisdiction* (R., 17-8, 27-33, 39-40, 76, 616-18).

(2) The admission of plaintiff's testimony as to *statements made to him by two physicians* (not sworn

as witnesses) concerning the condition of his eyes, over the objection of defendants that this was *inadmissible hearsay* (Bill No. 5, R., 559-61), and the holding of the Circuit Court of Appeals that these rulings were "*not prejudicial error*" (R., 621-2).

(3) The admission, upon the issue of plaintiff's asserted loss of earnings as a representative of the Mullins River Lumber Company of British Honduras, of a letter from an officer of that concern (not sworn as a witness) to plaintiff, containing *asserted statements of fact* tending to support the plaintiff's case on this issue, over the objection that *this letter was inadmissible as proof of the asserted facts therein recited* (Bill No. 10, R., 579-84; R., 324-5), and the holding of the Circuit Court of Appeals that this ruling "*did not involve reversible error*" (R., 622-4).

(4) The *denial of defendants' motion to instruct the jury to find for defendants* upon plaintiff's claim for $500 as asserted loss of earnings as a representative of the Mullins River Lumber Company (Bill No. 11, R., 584-7), and the approval of this ruling by the Circuit Court of Appeals (R., 624).

(5) The charge of the district judge to the jury that the defendants in this case are *jointly liable* to plaintiff under the contract of carriage in question, to which the Southern excepted upon the ground that *this imposed upon it a liability for the consequences of the negligence of the L. & N.* (Bill No. 16, R., 601-6);

and the approval of this charge by the Circuit Court of Appeals (R., 624).

We will now discuss the foregoing points *seriatim*, reserving fully all other points made.

Point No 1.

Plea to Jurisdiction.

Statement of Plea.

The exception of the Southern to the jurisdiction rests upon the three following propositions:

(A) That when a foreign corporation, sued in a Federal district court, has *designated an agent for service of process pursuant to State statutory provisions*, the Federal court will recognize *the limitations fixed by State law* as to the jurisdiction acquired *quoad* such a defendant, through service upon this designated agent.

(B) That, under the *Louisiana law*, a foreign corporation, which has designated an agent for service of process, pursuant to State statutory provisions, is *subject to suit in the Louisiana courts only upon causes of action arising out of business done in that State*, and not upon causes of action arising elsewhere.

(C) That the present cause of action, *insofar as the Southern is concerned, does not arise out of any business done by the Southern in Louisiana*, but arises entirely out of business done by that corporation outside that State.

Facts.

The facts upon the jurisdictional issue are simple and undisputed. While the plaintiff purchased from the L. & N., in New Orleans, a through ticket for a trip from that point to Washington, *this ticket did not entitle him to transportation by the Southern until he reached Atlanta* (R., 2-3, 168-9, 251-8). The L. & N., which sold this ticket in New Orleans and which transported this passenger from that point to Montgomery, and the Atlanta & West Point, which transported him from Montgomery to Atlanta, are both corporate entities, *entirely separate and distinct from the Southern*, and are not subsidiaries of the Southern (R., 128). *The Southern received this passenger at Atlanta, and transported him from that point to Washington* (R., 2-3, 224, 251-8). The accident occurred at some point in Virginia about two hours' south of Washington (R., 3, 219, 234).

The trip was made on a through train operated between New Orleans and Washington, over the lines of the three railroads in question (R., 168-9, 224, 209-9). The plaintiff rode in the same car for the entire length of his journey (R., 168-9). This car was the property of the Southern (R., 223).

The Southern itself operates no railroad lines at all within the State of Louisiana (R., 105). Railroad properties within that State are owned and operated by the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company, which are

separate corporate entities and function as such, and practically all of the stock in these corporations is owned by the Southern (R., 105-22). *Neither of these lines participated at all in the movement of this passenger.* The Southern maintains passenger and freight soliciting offices in New Orleans, along with a number of other affiliated railroad corporations such as the two just named, and this office solicits freight and passenger business for the lines of the Southern itself, which are located entirely outside of Louisiana (R., 108-9). *The Southern has designated a Louisiana agent for service of process, in accordance with the State statutory provisions on the subject* (R., 27, 105), *and process in this suit was served upon that agent* (R., 27).

POINT NO. 1 A.

Plea to Jurisdiction.

Federal Courts Follow State Rule as to Jurisdiction in Suit Against Foreign Corporation Served Through Designated Agent for Service of Process.

The main basis of the ruling against us on the jurisdictional issue, both in the District Court (R., 27-33), and in the Circuit Court of Appeals (R., 616-8), is the holding that when a foreign corporation is doing business within a State and has designated a statutory agent for service of process there, and when the requisites peculiar to Federal district court jurisdiction are present (in this case, diversity of citizenship, amount

involved more than $3,000, and district of plaintiff's residence—Judicial Code, Sec. 24(1); U. S. Code Title 28, Sec. 41 (1), the Federal district court has jurisdiction, *regardless of the situs of the origin of the cause of action and regardless of the State rule on the subject.*

We submit that this ruling is *in conflict with a number of decisions of this Court*, cited hereinafter, and we place particular emphasis in this connection upon the *two recent cases* of Mitchell Furniture Co. *vs.* Selden-Breck Construction Co., 257 U. S., 213, and Missouri Pacific Railroad Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533.

In supporting this ruling, the district judge cited (R., 27-33) quite a number of authorities, but the Circuit Court of Appeals (R., 617-8) confined itself to *one citation*, Barrow Steamship Co. *vs.* Kane, 170 U. S., 100. This was a suit by a citizen of New Jersey in a New York Federal court against a foreign corporation doing business in New York. Plaintiff claimed damages for an assault upon him by employees of defendant at Londonderry, Ireland, in the course of a voyage from Londonderry to New York. Service was made upon the agents having charge of defendant's business in New York, but it was *not shown that the defendant had designated a statutory agent* for service of process in that State (170 U. S., 104).

The defendant questioned the jurisdiction, invoking the rule of State law (170 U. S., 104-5) that a *non-resident plaintiff* could not sue a non-resident defend-

ant in the New York State courts, except upon a cause of action arising in that State. This Court held this restriction inapplicable to an action in a Federal court, saying (p. 112):

> "The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts *by citizens and residents of other States* cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States."

The cited case does not involve the situation here presented—a *resident plaintiff* seeking to sue a foreign corporation in a Federal district court, *although such a suit could not have been maintained by this resident plaintiff in a court of his own State, having the same territorial jurisdiction*, because of the foreign situs of the origin of the cause of action. On the contrary, the State statute involved in the cited case (170 U. S., 104), *discriminated between resident plaintiffs and non-resident plaintiffs*, permitting the former to sue a foreign corporation doing business in the State upon any cause of action, but permitting the latter to sue such a defendant only upon a cause of action arising within the State. This Court recently condemned such a discrimination against non-resident plaintiffs in Missouri-Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533, saying (p. 535):

> Under §2 of Article IV of the Federal Constitution, the citizens of each State are entitled

> to all privileges and immunities of citizens in the several States. *This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.*"

This *lone decision* cited by the Circuit Court of Appeals was rendered thirty years ago, at a time when the development of the law governing jurisdictional questions in suits against foreign corporations was *still in its early stages.* All of the other and even less pertinent decisions of this Court cited on this point by the district judge were rendered in the *same era.*

The decision in the Barrow Steamship Company case was rendered *before this Court decided* (Old Wayne Mutual Life Assn. *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Ry., 236 U. S., 115); that when a foreign corporation does business in a State *without designating* the required statutory agent for service of process, its presumed assent to being sued there is *strictly limited to causes of action arising out of business done by it within that State.* Since the foreign corporation in the Barrow Steamship Company case was not shown to have designated an agent for service of process in New York (170 U. S., 104), a *different result* would have been reached in that case by the application of the doctrine *subsequently developed* in these two later cases.

The next step in the *progressive development* of the law on this subject was Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. This Court there held that, *when a foreign corpo-*

ration has designated an agent for service of process pursuant to State statutory requirements, ***It is for the State to determine whether this agency covers service of process only in suits arising out of business done within the State***, or whether this agency extends to service of process in all transitory actions, however and wherever arising. This Court assimilated the appointment of a statutory agent for service of process to the ***creation of an agency by a written document***, the terms of which are subject to State judicial interpretation. To this effect it said (p. 96):

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."

This doctrine puts the plaintiff here in an ***inconsistent position***. If the Southern had not designated an agent for service of process in Louisiana, ***it is extremely doubtful whether it would have been suable in Louisiana at all***, since the record shows (R., 105-9) that the only business which the Southern itself transacts in Louisiana is the soliciting of freight and passenger business for the benefit of its own railroad lines located entirely outside the State (Green *vs.* C., B. & Q. R. R. Co., 205 U. S., 530; Davis *vs.* Farmers Co-operative Equity Company, 262 U. S., 312). In the absence of such a designation of a statutory agent for service of process, this foreign corporation would have been suable in Louisiana, if at all, ***only upon causes of action arising out of the business transacted by it in***

that State and not upon causes of action arising elsewhere (Simon *vs.* Southern Railway Company, 236 U. S., 115; Old Wayne Mutual Life Association *vs.* McDonough 204 U. S., 8.

The plaintiff accordingly assumes an untenable position when he argues that the Federal District Court sitting in Louisiana has jurisdiction of a defendant foreign corporation served through its statutory agent even though the Louisiana rule restricts actions against the foreign corporation through service upon that agent to suits upon causes of action arising out of business done by that corporation within the State, and even though this particular cause of action does not arise out of any business done by the foreign corporation within the State. In such a situation, the plaintiff, in an effort to bring the defendant into court, *uses the statutory agent;* and then, *having thus taken the benefit of the State statutes* and used the statutory agent, *inconsistently argues that that agent has greater powers than the State statute gives him* (Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93). The two positions are clearly incompatible. *Plaintiff seeks the benefits of an agency which the State law has created, and at the same time he repudiates the limitations upon this agency established by this same State law.*

The rulings of the District Court and the Circuit Court of Appeals on this issue *conflict directly with the ruling of this Court in the recent case* of Mitchell

Furniture Company *vs.* Seldon-Breck Construction Company, 257 U. S., 213, an action filed in an Ohio State Court by an Ohio corporation, for damages for the breach of a contract made outside Ohio and to be performed outside Ohio. The defendant was a foreign corporation which had done business in Ohio, and which had qualified in that State by designating an agent for service of process pursuant to the State statutes. *Service was made upon this designated agent.* The defendant removed the suit to the appropriate Ohio Federal District Court, which held that this service did not give the court jurisdiction over the defendant. That court then dismissed the suit for want of jurisdication, upon the plaintiff's statement that it could not secure service otherwise (257 U. S., 214). As this analysis shows, while the suit originated in a State court, *it was removed to a Federal court and the jurisdictional question passed upon by the latter court involved its own jurisdiction*, and not merely the jurisdiction of the State court.

Upon appeal, this Court affirmed the judgment, saying (p. 215):

> "*The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the* State. Of course when a foreign corporation appoints one as required by statutes *it takes the risk* of the construction that will be put upon the statute and the scope of the agency by the State court. Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. But the reasons for a limited

interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into busienss in the State without appointing one. In the latter case the implication is limited to business transacted within the State. Simon *vs.* Southern Ry. Co., 236 U. S., 115, 131, 132. Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8, 22, 23. *Unless the State law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere,* at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. Chipman, Ltd., *vs.* Thomas B. Jeffery Co., 251 U. S., 373. *The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this State.' Gen. Code* § 181. *As we know of no decision to the contrary by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad.*"

This is a recent and direct ruling by this Court that the jurisdiction of a Federal District Court over a foreign corporation, cited through service upon its agent designated for service of process under State statutory provisions, *depends upon these State statutes and the interpretation thereof.* The decisions of the District Court and of the Circuit Court of Appeals are *directly in conflict with this recent ruling of this Court.* This conflict, we submit, should induce this Court to grant a certiorari herein.

Our case is even stronger than is the case just cited. In that case, the court ruled that a Federal District Court has no jurisdiction in a suit against a foreign corporation arising out of business done outside the State, through service upon a statutory agent, *unless the State law "either expressly or by local construction"* (257 *U. S.*, 216) *has extended the jurisdiction* acquired through service upon such an agent to suits arising out of business transacted outside the state. In the present case, on the other hand, the Louisiana jurisprudence, to which we will refer, *specifically restricts jurisidction* over a foreign corporation with a designated agent for service of process, to suits arising out of business done within the State.

In this connection, see also Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, where this Court said (p. 535):

> "Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by*

them in the State." Mitchell Furniture Co. *v.* Selden Breck Construction Co., *ante*, 213; Old Wayne Mutual Life Association *v.* McDonough, 204 U. S. 8, 22; Simon *v.* Southern Ry. Co., 236 U. S. 115, 130.

Although *we cited and stressed these two recent and clearly pertinent rulings of this Court*, both in the District Court and in the Circuit Court of Appeals, *neither of these cases are mentioned*, either in the opinion of the District Court (R., 27-33), or in the opinion of the Circuit Court of Appeals (R., 616-18) herein. We submit that the *conflict* between (1) the holding of the District Court and of the Circuit Court of Appeals herein and (2) these two recent rulings of this Court, is sufficient to show that this case clearly merits review here by certiorari. The *failure of either of the courts below to mention*, or to endeavor to distinguish or differentiate them is significant.

The rulings below also conflict with the ruling in Maxwell *vs.* Atchison Railroad Company, 34 Fed. (C. C. E. D. Mich.), 286—an opinion by Judge Brown, who shortly thereafter was appointed a justice of this Court. That case, upon the jurisdictional issue, is *strikingly similar to the present case* as to the facts (pp. 286-7), as to the situs of the origin of the cause of action (34 Fed., 287), and as to the rule of State law, limiting suits against foreign corporations to causes of action arising within the State (34 Fed., 287). In this situation, Judge Brown maintained a plea to jurisdiction, treating the rule of State law as

applicable to the jurisdiction of a Federal court over such a case (34 Fed., 289).

In addition to the Barrow Steamship Company case (the *only authority* relied on by the Court of Appeals in support of its ruling on this point), the district judge also cited a number of other cases (R., 27-33). None of these other decisions pass directly upon the point here at issue, and *none of them are as strong as authority for the position of the plaintiff on this point as is the Barrow Steamship Company case.*

Since the Circuit Court of Appeals has not seen fit to rest its ruling herein upon these other cases cited by the district judge, it may be that this Court will not deem it necessary, upon this application for a certiorari, to give detailed consideration to these other citations. For the sake of fulness of treatment, however, we have analyzed briefly these other authorities cited by the district judge in Appendix A printed at the end of this brief.

Upon the foregoing, we respectfully submit that the holdings of the District Court and the Circuit Court of Appeals upon this phase of the jurisdiction issue, *are erroneous and in conflict with the decisions of this Court* and the Federal jurisprudence upon this question of law; and that the case accordingly clearly merits review here by certiorari upon this issue.

While the jurisdictional question in the present case involves other points of law, which we will discuss hereinafter, the holding of the Circuit Court of Appeals against us upon the plea to the jurisdiction is based primarily upon its ruling on the question of law

discussed in the section of this brief. *The conflict in the jurisprudence which we have demonstrated accordingly relates to the question of law which the Circuit Court of Appeals deemed controlling, upon the jurisdictional issue.*

POINT No. 1 B.

Plea to Jurisdiction.

Foreign Corporation with Designated Agent for Service of Process not Suable in Louisiana Courts on Cause of Action not Arising Out of Business Done by It in That State.

The District Judge (R., 27) *conceded the correctness of our contention* that a foreign corporation designating an agent for service of process in Louisiana, becomes thereby suable in the State courts, under the State law, *only upon causes of action arising out of its business within that State*, and not upon causes of action arising out of its business elsewhere. The Circuit Court of Appeals *indicated a view to the contrary, but found it unnecessary to pass upon this point directly* (R., 616-17). The Circuit Court of Appeals made no reference to and apparently overlooked the *recent decision of this Court sustaining our contention* as to the Louisiana rule on this point (Missouri Pacific R. R. Co. vs. Clarendon Boat Oar Co., 257 U. S. 533, quoted *infra*).

This Court has definitely settled the rule to be that (1) when the foreign corporation is doing business in a State *without complying with statutory require-*

ments for the designation of an agent for service of process, the jurisdiction of the courts of that State, as to suits against that corporation, is *necessarily limited to causes of action arising out of business done in that State*, and cannot constitutionally extend to causes of action arising out of business done elsewhere (Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Railway Company, 236 U. S., 115), and (2) when the foreign corporation has *designated an agent for service of process* pursuant to State statutory requirements, *it is for the State to determine*, either by a specific statute or by judicial interpretation, whether the foreign corporation is suable there only upon causes of action arising out of business done within that State, or whether the foreign corporation is suable there upon all transitory causes of action, however and wherever arising (Pennsylvania Fire Insurance Company *vs.* Gold Issue Mining & Milling Company, 243 U. S., 93).

This Court has very clearly recognized, in the recent case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, that *Louisiana has limited suits* in its courts against a foreign corporation with statutory agent, *to causes of action arising out of business done within the State.* The Louisiana decisions affirmed by this Court in that case are not reported, but the progress of this litigation through the State courts is thus described by this Court in the following language (p. 534):

> "Acts 243 of 1912, p. 343, and Act 267 of 1914, p. 532, of the Annual Laws of Louisiana,

provide that service on foreign corporations may be made on any agent which the corporation has designated, and require that every foreign corporation doing business in the State shall file a written declaration with the Secretary of State, showing its domicile and the place or places where it is to do business and designating its agent, resident in the parish where its business is to be done, and that service on said agent, whether personal or domiciliary, shall be a valid service on it. *The Court of Appeals in this case held, following what it deemed to be the holding by the Louisiana Supreme Court in the case of Watkins v. North American Land & Timber Co., 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309, that the Louisiana statute was not intended to give the State courts jurisdiction over foreign corporations by service on agents appointed thereunder, in transitory actions arising in another State. The action of the Supreme Court in refusing to entertain an appeal in this cause shows this to be the authoritative construction of the statute by the State courts.*"

In affirming the judgment, and in approving the rule of State law thus outlined, this Court further said (p. 535):

"Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to

include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.* Robert Mitchell Furniture Co. v. Selden Breck Construction Co. (opinion handed down December 5, 1921), 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201; Old Wayne Mutual Life Association v. McDonough, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345; Simon v. Southern Railway, 236 U. S. 115, 130, 35 Sup. Ct. 255, 59 L. Ed. 492. The latter case was a Louisiana case under this same law."

More recent rulings to the same effect by the Louisiana courts are found in Delatour & Marmouget *vs.* Southern Railway Company, 4 La. Ap., 658, and Buscher *vs.* Southern Railway Company, 4 La. Ap., 653. These are companion suits (1) by the owners of four race-horses and (2) by the caretaker who accompanied these race-horses for damages alleged to have been sustained in a railroad accident at Greenville, S. C., while the freight car containing the race-horses and the caretaker was in the custody of the Southern. This car was then moving from Washington to New Orleans over the *identical railroad lines* which carried the plaintiff in the present case from New Orleans to Washington. The cases just cited accordingly resemble the present case, in so far as the

Southern is concerned, in that in each of these cases the movement over the lines of the Southern was between Atlanta, Ga., and Washington, D. C.—*entirely outside the State of Louisiana.* A further point of resemblance is that in each of these cases *the accident in question occurred at a point outside the State of Louisiana,* during the movement over the lines of the Southern between the points above named.

In the two cases cited, the Louisiana Court of Appeals for the Parish of Orleans maintained pleas to the jurisdiction filed by the Southern, based upon the *same contention* as is urged by that litigant here. As the report of these cases shows, *the Louisiana Supreme Court approved the ruling* by denying applications for writs of review.

The holding of the Court of Appeals for the Parish of Orleans in these cases (thus approved by the Louisiana Supreme Court) is stated in the syllabus (by the Court) in the two cases (4 La. Ap., 653, 658). The wording of this syllabus (identical in both cases) is as follows:

> "In a transitory action *arising in another State,* the courts of this State, irrespective of the citizenship of the plaintiff, are *without jurisdiction to entertain a suit brought against a foreign corporation* doing no local business within this State. Under such conditions, a plea taken to the jurisdiction is well-founded, despite the fact that the defendant corporation, under the laws of this State, has *voluntarily designated an agent to represent it within this State,* as one upon whom citation may be served."

And in the body of the opinion in the Delatour & Marmouget case, the court said, referring to the decision of this Court which we have cited *supra* (p. 661):

> "It is our opinion, that the question is no longer open to discussion, *in the light of what has been determined by the United States Supreme Court* in the case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S. 533."

This question is discussed in an earlier Louisiana decision, State *ex rel.* Watkins *vs.* North American Land & Timber Company, 106 La., 621; 31 Sou., 172, a mandamus proceeding involving the asserted right of a stockholder in an English corporation, qualified to do business and having an office in Louisiana, to inspect the corporate books and records of the Louisiana office. In that case the Louisiana Supreme Court referred to the jurisprudence in *some other States* which permits a foreign corporation, with a designated agent for service of process, to be sued in such States upon all transitory causes of action, however or wherever arising, and it then said (p. 630):

> "*It is not necessary, nor would we be disposed, to adopt the extreme view last above referred to.* On the contrary, we might hold that the jurisdiction acquired by service of process on respondent's agent in this State is confined to cases in which the cause of action arises here, and nevertheless maintain the jurisdiction so acquired in the instant case. For, whilst the relator's right, if he has any, to inspect the

> respondent's books, may spring from the contract made in England, the cause of action disclosed in his petition consists of the refusal of the respondent's agent here to permit him to exercise that right."

A similar reference to the different and more liberal rule prevailing in *some other States* on this point will be found in the opinion in Williams *et al. vs.* Pope Manufacturing Co., 52 La. An., 1417; 27 Sou., 851, but that case actually involved a suit by residents of Mississippi against a foreign corporation doing business in New Orleans, for *an alleged tort committed in New Orleans* (libel, slander, public defamation, malicious prosecution and false imprisonment), and the question here involved was not there presented for decision.

It is clear from the foregoing that neither in the Watkins case nor in the Williams case was there any direct ruling upon the point now at issue. Furthermore, the *later Louisiana jurisprudence* (which we have reviewed, which is directly in our favor, and which has received the *specific approval of this Court*) clearly predominates over any dicta to the contrary which may be found in the two earlier cases.

When the decisions which we have cited were rendered, the Louisiana statute then in force on the subject of the designation of an agent for service of process by a foreign corporation was Act 243 of 1912, which reads as follows:

> "That it shall be the duty of every foreign corporation other than foreign insurance companies doing business in this State to file in the

office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, the place of its principal business establishment, and the name of its agent or agents or other officer in this State upon whom process may be served, provided, that on foreign corporation shall select as its agent or agents for service any person not residing in a parish where said corporation has an established business and, provided further that *service on said agent whether personal or domiciliary shall constitute a valid service on said foreign corporation.* Provided that every foreign insurance company doing business in this State shall appoint the Secretary of State its agent upon whom all legal processes shall be served, and such service shall be legal and valid, as against such foreign insurance company."

Since the rendition of these decisions, but prior to the institution of the present suit, the Louisiana Legislature enacted on this subject Act 184 of 1924, which contains the following pertinent provisions:

"Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of said corporation consenting and agreeing on the part of the said corporation that *any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation* and

> that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation *growing out of or connected with the business done by said corporation in this State.*"

The latter portion of the above quotation from this new statute clearly indicates that the primary aim of the legislature was to subject the foreign corporation to suit in the State on *causes of action arising out of business done by it within the State.*

The Circuit Court of Appeals, in its opinion herein, suggests (R., 616-7) that the clause "*any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation*" has changed the State law upon the point under consideration, and that the specific decisions which we cite in our favor on this issue no longer represent the State law. The new statute in question has never been construed by any Louisiana court, and the clause stressed by the Circuit Court of Appeals, as quoted above, does not differ materially in its wording from the corresponding clause in the earlier statute, that "*service on said agent whether personal or domiciliary shall constitute a valid service upon said corporation.*"

The *real new legislation* in Act 184 of 1924 is the added proviso *continuing the agency* for service of process as to all liabilities arising from operations in the State of a corporation that has left the State. The evident purpose of this enactment was to remedy this omission in the earlier statutes on the subject. See

Gouner *vs.* Missouri Valley Bridge & Iron Co., 123 La., 964; 49 Sou., 657.

As we have pointed out, there is *no substantial difference* in the wording of statutes *qua ad* the provision that process served on the designated agent is a valid service on the corporation. In this situation, *the construction of the earlier statute*, which sustains our contention, *applies also to the later statute*. To this effect, see the following authorities:

Stewart vs. Kahn, 11 Wall., 493 (p. 502):

> "A change of language in a revised statute will not change the law from what it was before, *unless it be apparent that such was the intention of the legislature.*"

Anderson vs. Pacific Coast S. S. Co., 225 U. S., 187 (p. 199):

> "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect *unless such intention is clearly expressed.* United States *v.* Ryder, 110 U. S. 729, 740; United States *v.* LeBris, 121 U. S. 278, 280; Logan *v.* United States, 144 U. S. 263, 302; United States *v.* Mason, 218 U. S. 517, 525."

25 R. C. L., 1050:

> "In the case of a general revision or codification of statutes it is well settled that a mere change of phraseology or the omission or addition of words will not

> necessarily change the operation or construction of former statutes, for the new language may be attributed to a desire to condense and simplify the law. *The language of the statute as revised or the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation.*"

The point here involved is a question of State statutory construction. Since there are no State decisions construing the new statute, the Federal courts might perhaps be justified in formulating their own construction of any new provision therein contained, particularly if (*as is not the case here*) the language of the pertinent provision in the new statute differed radically from the wording of the corresponding provision of the old statute.

The suggestion of the Circuit Court of Appeals that the new statute has changed the State law in this respect (based upon an *unsubstantial variance* in the pertinent language of the two statutes in question), is in *direct conflict* with the rule for the interpretation of statutory provisions of this particular character, *stated by this Court in the two recent decisions* upon which we rely:

> *Mitchell Furniture Company vs. Selden-Breck Construction Company*, 257 U. S., 213 (p. 216):

> "Unless the State law either expressly or by local construction gives to the appointment a larger scope, *we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere,* • • ..."

Missouri-Pacific R. R. Co. vs. Clarendon Boat Oar Co., 257 U. S., 533 (p. 535):

> ..• • • in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, *this Court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.*"

Upon the foregoing, we submit that the law is clearly with us upon this phase of the case, and that the suggestion of the Circuit Court of Appeals to the contrary is: (1) clearly erroneous, and (2) in *direct conflict with the pertinent principles enunciated in the decisions of this Court on the subject.*

Point No. 1 C.

Plea to Jurisdiction.

Present Suit Does Not Arise Out of Any Business Done by Southern in Louisiana.

The District Judge resolved this question *against us* (R., 27-8). The Circuit Court of Appeals *did not find it necessary to decide* this point.

The plaintiff bought his ticket in New Orleans from the L. & N. (R., 168). The train which carried him out of New Orleans and beyond the boundaries of Louisiana, was operated by the L. & N. over its own tracks (R., 291-2).. From New Orleans to Atlanta, this train was operated by the L. & N. and other railroad corporations, all entirely independent of the Southern (R., 128). *All that the Southern did, as to the plaintiff, was to receive him as a passenger at Atlanta and to transport him from there to Washington, a movement entirely outside the boundaries of Louisiana. The accident occurred in the course of this transportation while the train was at some point in the State of Virginia* (R., 3, 219, 234).

The record shows that the *plaintiff's dealings in New Orleans* as to the trip in question were *entirely with the L. & N.* (R., 168), from which he purchased his ticket. There is no showing in the record that he has any dealings in New Orleans as to the trip in question either with the Southern soliciting office there, or with the offices of the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company there. In fact, these lines operate a competing route to Washington from New Orleans.

On this phase of the case, we are accordingly not concerned with the fact that the Southern owns almost all of the stock in the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company (R., 121-2), which own and operate railroad properties in Louisiana (R., 105-6) but which *function as*

separate corporations (R., 108). *This stock ownership does not make the acts of these other corporations the acts of the Southern* (Peterson vs. C. R. I. & P. Ry. Co., 205 U. S., 364. Nor are we concerned with the testimony as to the passenger and freight soliciting offices maintained in New Orleans by the Southern Railway System, which solicit freight and passenger business for the lines of the Southern itself, lying entirely outside the State of Louisiana (R., 108-9). Our plea to the jurisdiction is not based upon the allegation that the Southern does no business whatsoever in Louisiana, but rather upon the assertion that whatever business it may or may not do there in other connections, *the present suit does not arise out of any business done by it in that State.*

The argument that this suit as to the Southern exhibits a cause of action arising out of business done by that corporation in Louisiana rests upon the following elements:

(*a*) The purchase by plaintiff from the L. & N. in New Orleans of a through ticket entitling him to transportation from New Orleans to Washington and specifying travel over the lines of the Southern for that part of this journey between Atlanta and Washington.

(*b*) The transportation of plaintiff from New Orleans to Washington in a through train known as the Piedmont Limited, operated by the various other railroad corporations previously named, over their respec-

tive lines, and by the Southern over its lines, from Atlanta to Washington.

(*c*) The use in this through train of a car belonging to the Southern, and the fact that plaintiff rode in this car from New Orleans to Washington, the movement from New Orleans to Atlanta being over lines other than the Southern.

Under the jurisprudence of this Court, none of the above facts constitute the doing of business in a legal sense by the Southern in Louisiana. It follows from this that (whatever business the Southern may or may not do in Louisiana as to other matters) the present suit, *quoad* it, does not arise out of any business done by it within that State. The ruling of the District Judge in the present case to the contrary on this point is clearly at variance with the applicable jurisprudence of this Court.

These elements were *all involved* in the case of Peterson *vs.* C., R. I. & P. Ry. Co., 205 U. S., 364. In that case two railroad corporations (one called the Pacific Company and the other called the Gulf Company in the opinion) operated a *continuous railroad line* through Texas and other States. The Gulf Company owned and operated this line in Texas to the Texas border. The Pacific Company owned and operated a line from that point northward. The suit in question was an action for damages for the alleged killing of an engineer in the employ of the Pacific Company in Indian Territory. The action was filed in a

Texas Federal court. Jurisdiction was sought to be maintained as to the Pacific Company upon the theory that, because of its relationship with the Gulf Company, it was doing business in Texas *through the agency of the Gulf Company.*

It was shown that the Gulf Company sold tickets in Texas, good for a through trip over its own lines to the Texas border and over the lines of the Pacific Company beyond. It was further shown that the two railroads operated through trains, without any change of cars at the point where their lines joined at the Texas border. It was even shown that the same employees handled these trains on both sides of this point of joinder, being paid by the Gulf Company for the time which they worked on the Texas side of this point and being paid by the Pacific Company for the time which they worked on the other side of this point; it was also shown that the Pacific Company owned a controlling stock interest in the Gulf Company.

This Court held that this stock ownership did not make the Gulf Company the agent of the Pacific Company, saying (p. 391):

> "It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the

> directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; *but this power does not make it the company transacting the local business.*"

This Court further held that the sale of through tickets by the Gulf Company, entitling the purchasers to transportation over the lines of the Pacific Company lying outside of Texas, did ont constitute a doing of business in Texas by the Pacific Company. To this effect it said (p. 394):

> "The conductors, one of whom was served, when he crossed the Texas line, this record shows, *became the servant and agent of the Gulf Company.* The ticket agent sold tickets for the Gulf Company, in whose employment he was. He would also sell tickets good upon its line, and over the lines of the Pacific Company, but *he transacted this business as the agent of the Gulf Company.*"

For these and other seasons fully stated in the opinion, this Court held that the recited facts as to the relationship between the Pacific Company and the Gulf Company did not constitute a doing of any business in Texas by the Pacific Company, through the Gulf Company, so as to make the former subject to suit in that State. The judgment maintaining the plea to the jurisdiction was accordingly affirmed.

The present suit is not nearly so strong on the facts for the plaintiff as was the cited case. In the present case the L. & N., the seller of the ticket and the initial

carrier, is an *independent corporation*, not a subsidiary of the Southern and forming *no part of the Southern Railway System* (R., 128, 292). In the present case the Southern did not receive the plaintiff as a passenger until the train reached Atlanta, *several hundred miles from the Louisiana border* (R., 3). The lines of the Southern and of the L. & N. on this trip do not even directly connect, and there is an *interesting intermediate carrier* from Montgomery to Atlanta, the A. & W. P. (R., 292), which is neither owned nor controlled by the Southern (R., 128).

Another decision of this Court supporting our position in the case is Philadelphia & Reading Co. vs. McKibben, 243 U. S., 264. That case exhibits an effort to sue the Philadelphia & Reading Company in New York, although it was a Pennsylvania corporation operating and owning railroad lines in Pennsylvania and New Jersey, and not in New York. The suit arose out of a New Jersey accident.

One basis for the contention that the Philadelphia & Reading Company was doing business in New York was the fact that the Central Railroad Company of New Jersey sold through tickets in New York, good for transportation over its own lines in that State and over the lines of the Philadelphia & Reading Company in other States. The facts in this connection are fully stated in the opinion of the court. In holding that these facts do not amount to doing business in New York by the Philadelphia & Reading Company, this Court said (p. 268):

"The finding that the defendant was doing business within the State of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. *Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every State.*"

Another case in point here is General Investment Co. *vs.* Lake Shore & M. S. R. R. Co., *et al.*, 250 Fed. (6th C. C. A.), 160; affirmed 260 U. S., 261. In that case, the ruling was that the New York Central Railroad Company was not doing business in Ohio and was not subject to suit there.

This railroad admittedly did not own and operate any property in Ohio itself, but the contention was that it was doing business there through its connecting lines, the plaintiff there invoking the elements (involved in this case also) of the sale of through tickets and the operation of through trains and through cars. The facts in this respect are fully set forth in the opinion of the Circuit Court of Appeals in the cited case (250 Fed., 165-6). That Court ruled against the plaintiff, following the decisions of this Court which we have just cited and saying (250 Fed., 166-7):

"The doctrine of this case was recently reaffirmed and emphasized in Philadelphia Railway *vs.* McKibbin, 243 U. S., *supra*, at page 268,

> 37 Sup. Ct., 280, 61 L. Ed., 710, in which it was held that *the sale by a local carrier within a State of through tickets over the line of a foreign connecting carrier did not involve a doing of business within the State by such connecting carrier*, otherwise, 'nearly every carrier in the country would be "doing business" in every State'; and that even if the defendants' 'subsidiary companies' did business within the State, this would not, under the authority of the Peterson case, warrant a finding that it did business there."

In affirming this judgment, this Court specifically rested its ruling upon the reason assigned by the Circuit Court of Appeals, as to this phase of the case. (See 260 U. S., 268.)

Other cases sustained our contention upon this issue are as follows:

> Cancelmo *vs.* Seaboard Air Line Ry., 12 Fed. (2) (Cts. Ap. D. C.), 166.
>
> Allen *vs.* Yellowstone Park Transportation Co., 154 Fed. (C. C. E. D. Mo.), 504.
>
> Maxwell *vs.* Atchison R. R. Co., 34 Fed. (C. C. E. D. Mich.), 286.

In contending that the present suit *quoad* the Southern arises out of business done by that corporation in Louisiana, the plaintiff's main argument has been that, when he purchased a through ticket from the L. & N., in New Orleans, entitling him to transportation over the line of the Southern from Atlanta to Washington, this transaction amounted to a doing of business in

Louisiana by the Southern through the L. & N. as its *agent*. The decisions of this Court which we have already reviewed are sufficient to dispose of this argument. This contention is also *at variance with the ruling of this Court* in the recent case of Bank of America *vs.* Whitney Central National Bank, 261 U. S., 171, wherein it was contended that the Whitney Central National Bank (of New Orleans) was doing business in New York and subject to suit there, because its business relationship with various New York banks constituted the latter as *agents* of the Whitney Bank in certain New York transactions. In affirming a judgment of dismissal for want of jurisdiction, this Court said (p. 173):

> "Its regular New York business was transacted for it by its correspondents—the six independent New York banks. *They, not the Whitney Central, were doing its business in New York.*"

Upon the foregoing, we respectfully submit that whatever other business the Southern may or may not do in Louisiana, *the plaintiff's cause of action, as against the Southern, cannot be said to arise out of any business done by that corporation in Louisiana.* The plaintiff's cause of action, as against the Southern, rests entirely upon the facts (*1*) *that it transported him as a passenger from Atlanta to Washington, and* (*2*) *that an accident occurred in the course of this transportation at some point in Virginia.* In this situation, it is clear that, *quoad* the Southern, the plaintiff's

cause of action arises out of business done by that corporation outside of Louisiana, and not out of any business done by that corporation within Louisiana. The decisions of this Court cited above clearly sustain this position, and it is obvious that the district judge and the Circuit Court of Appeals erred in not so holding.

POINT NO. 1 D.

Plea to Jurisdiction.

Rendition of Judgment by Court Without Jurisdiction Violative of Due Process Clause.

The constitutional issue of "*due process of law*" (R., 76) is involved in the judisdictional question in this case. It is fundamental that *jurisdiction* in the court rendering the judgment is one of the *essentials of "due process."*

This has been recognized in the leading case of Pennoyer *vs.* Neff, 95 U. S., 714, wherein this Court said (p. 733):

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that *proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.*"

While the language above quoted refers to "due process" in State court proceedings, this language is

equally applicable to "due process" in Federal court proceedings, since the Fifth Amendment thus regulated Federal action long before the Fourteenth Amendment thus regulated State action.

The same principle is also stated in Twining *vs.* N. J., 211 U. S., 78, wherein this Court said (p. 110):

> "*Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction.*" Pennoyer *v.* Neff, 95 U. S., 714, 733; Scott v. McNeal, 154 U. S., 34; Old Wayne Life Association *v.* McDonough, 204 U. S., 8.

To the same effect, see also Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8 (a case frequently cited in our argument on the jurisdictional question wherein this Court thus described the contention which it there sustained (p. 15):

> "The plaintiff in error insists that the Pennsylvania court had no jurisdiction to proceed against it; consequently, the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment."

If this Court sustains our contention that the Southern is not subject to suit in a Louisiana Federal District Court through service upon the agent for service of process which it has designated in that State, the case will then come within the principle thus stated by this Court in Simon *vs.* Southern Railway Co., 236 U. S., 115 (p. 132):

> "From the principle announced in that case it follows that service under the Louisiana stat-

> ute would not be effective to give the District Court of Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was *not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama.*"

Upon the foregoing, we respectfully submit that if the plea to the jurisdiction be in fact good, the present proceedings, in so far as the Southern is concerned, exhibit a lack of one of the essentials of "due process." This shows that the jurisdictional issue involved herein is not an ordinary question of law, but involves the denial of a fundamental constitutional right.

Point No. 2.

Erroneous Admission of Plaintiff's Testimony as to Statements by Physicians Concerning His Eyes and Erroneous Classification of This Ruling by Circuit Court of Appeals as "Not Prejudicial Error" Upon Speculative Inference That Jury Was Not Influenced at All by This Testimony.

Upon the trial the plaintiff, on the issue of his alleged injuries, was permitted to testify to *statements assertedly made to him by two physicians* as to the condition of his eyes several weeks after the accident. The district judge overruled objections by defendants to the admission of this clearly hearsay testimony (Bill No. 5, R., 559-61; R., 171-2). The Circuit Court

of Appeals, without specifically approving or disapproving this rulin[illegible] classified it as "*not prejudicial error,*" upon the *speculative inference* that this testimony had no weight whatsoever with the jury (R., 621-2).

The admission of this hearsay testimony was *clearly erroneous*, under the fundamental principles of the law of evidence. The *speculative assumption* by the Circuit Court of Appeals that the error committed, if any, was harmless, is *in conflict with the decisions of this Court* to the effect that errors of this character can be classified as harmless *only when the court can say positively and beyond doubt* that the verdict of the jury could not have been affected or influenced to any extent by the testimony erroneously admitted.

The opinion of the Circuit Court of Appeals *does not fully reproduce* the evidence admitted over this objection. This evidence, as it appears in the record, was as follows (R., 171-2, 559-61):

> "*I went to see Dr. Bloom twice and they told me my eye was getting very bad. I went to see Dr. Rudolph Matas* * * * *Dr. Matas stated I was suffering with traumatic conjunctivitis.*"

Dr. Bloom is an *eye specialist* (R., 171). Dr. Matas is probably the *leading New Orleans physician*, and a man of national reputation. *Neither of these physicians testified in the case*, and there was no showing of any unsuccessful attempts by the plaintiff to procure their evidence.

The opinion of the Circuit Court of Appeals mentions only plaintiff's quotation of Dr. Matas. It does not mention plaintiff's quotation of Dr. Bloom, although the objections to both of these items of testimony are covered by the same bill (Bill No. 5, R., 559-61), and the same assignment (R., 84-5).

Under the *elementary principles* of the law of hearsay, the objections which we interposed to all of this testimony were *clearly good*, and the district judge clearly erred in overruling these objections.

In Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S. 99 (a personal injury suit), this Court held that a physician who had previously examined the plaintiff, and who testifies as a witness, may refer to a written statement of his findings made at the time of his examination, for the purpose of refreshing his memory, but that *the witness should not be permitted to read this statement to the jury* as a part of his testimony, although he identifies it as a correct statement prepared by him. This Court in that case said (p. 103):

> "The practice of admitting in evidence the *unsworn statements of witnesses, prepared, in* advance of trial, at the request of one party, and without the knowledge of the other party, *should not be encouraged by further departures from the established rules of evidence.*"

The evidence there held inadmissible was certainly much more authentic than the hearsay evidence admitted over our objection in the present case. In the cited case, the physician who was the author of this

written statement, testified under oath to its correctness.

The principle that makes this testimony inadmissible was recognized by our Circuit Court of Appeals itself, in its recent ruling in V. S. & P. Railway Company *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, a personal injury suit. The plaintiff there introduced in evidence his original army discharge (a much more authentic form of proof than verbal repetition by a patient of verbal statements of physicians) for the purpose of showing that he had been an able-bodied man at the time the document was issued. In holding that this document should have been excluded, the Circuit Court of Appeals said (p. 115):

> "It was clearly not admissible for that purpose, as was *an ex parte document, and could not have been binding upon defendant without an opportunity to cross-examine its maker.*"

The admission of testimony by a plaintiff in a damage suit for personal injuries, as to statements made to him concerning his injuries by physicians, is quite generally recognized as an erroneous violation of the rule against hearsay evidence. To this effect, see Louisville & Nashville Railroad Company *vs.* Lynch, 126 S. W., 362; 137 Ky., 696, wherein the court said:

> *"It was violative of one of the fundamental principles or rules governing the introduction of evidence to permit plaintiff to testify as to what his doctors had told him."*

To the same effect see, also, the following decisions:

Texas Power & Light Co. *vs.* Burger, 166 S. W. (Tex.), 680.

Trott *vs.* C. R. I. & P. Ry. Co., 86 N. W., 33; 115 Iowa, 80.

Johnson *vs.* Powell, 123 Pac., 881; 87 Kan. 142.

Louisville & Nashville R. R. Co. *vs.* Smith, 84 S. W., 755; 27 Ky. L. R., 257.

Zipus *vs.* United Railways & Electric Co., 108 Atl. (Md.), 884.

M. K. & T. Ry. Co. *vs.* Creswell, 78 S. W., 388; 34 Tex. Civ. Ap., 278.

The foregoing is sufficient to demonstrate that the admission of this testimony by the district judge clearly *violated the fundamental and elementary principles* of the law of evidence. The ruling admitting such testimony *conflicts* with the jurisprudence of this Court, with the prior jurisprudence of the Fifth Circuit Court of Appeals, and with the general jurisprudence on the subject.

The Circuit Court of Appeals did not specifically approve this ruling of the district judge. It merely classified the point as "*not prejudicial error.*" In speaking of the remark attributed by the plaintiff to Dr. Matas, it says (R., 622):

> "As the jury had before them the testimony of several physicians who were witnesses for the plaintiff, and the testimony of several other physicians who were witnesses for the defendant—*the testimony of the former tending to*

prove that the trouble in plaintiff's eye was due to small pieces of glass or other foreign substance getting into it, and the testimony of the latter tending to prove that trouble was not due to any foreign substance getting into the eye,— it seems quite reasonable to infer that the jury's conclusion as to the cause of the plaintiff's eye trouble was based on a consideration of the testimony of physicians given in the presence of the jury, and to no extent upon the above-mentioned statement of plaintiff as to what Dr. Matas said, especially as there was an absence of any evidence that Dr. Matas made an examination of plaintiff's eye, nothing in plaintiff's own testimony being inconsistent with the conclusion that the deposed-to statement of Dr. Matas as to the condition of plaintiff's eye was based solely on what plaintiff said to him as to the cause of the trouble. We are of opinion that there is no reasonable ground for believing that the result of the trial was affected to any extent by the statement of the plaintiff which is under consideration, and that the admission in evidence of that statement was *not prejudicial error.*"

The jurisprudence of this Court on the classification of error in the admission of testimony as "not prejudicial error" requires specifically that the Court so ruling must reach the conclusion that it is "*so clear as to be beyond doubt*" that the error did not and could not have prejudiced the party's rights to any extent (5 Wall., 808). The Circuit Court of Appeals, even in its incomplete analysis of the testimony erroneously admitted, *does not announce any such con-*

clusion. It simply states (R., 621-622) that the evidence of the physicians who did testify was *sharply conflicting* upon the issue of plaintiff's alleged injuries, and *it thereupon speculatively assumes* that the jury finding in favor of plaintiff upon the issue of eye injury was based *one hundred per cent* upon the testimony properly admitted and tending to sustain such a finding, and *nil* upon the testimony improperly admitted and tending to sustain such a finding.

It is indeed a novel doctrine that in such a situation an appellate court can classify an obvious error in the admission of testimony as "not prejudicial" by such *speculative inference.* The conceded fact that the properly admitted testimony was *sharply conflicting* on the issue in question rather indicates that the testimony improperly admitted on this issue *may probably have been a material factor* in swaying to its finding for the plaintiff.

We will now demonstrate that this ruling of the Circuit Court of Appeals, classifying a plain error in the admission of testimony as "not prejudicial error," upon the basis of what are necessarily nothing more than *speculative inferences,* is clearly at variance with the pertinent jurisprudence of this Court.

The early leading decision by this Court upon the classification of error by an appellate court as "not prejudicial error" is Deery *vs.* Cray, 5 Wall., 795. This Court there said, in declining to so classify an error committed by the trial court (p. 807):

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to beyond doubt that the error did not and could not have prejudiced the party's rights.* In the case before us this is not so clear."

This doctrine was reaffirmed in Gilmer *vs.* Higley, 110 U. S., 47, wherein this Court said (p. 50):

> "We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that *when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded.* This court, in Deery *v.* Cray, 5 Wall., 807, used this language:
>
> "'Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'"

And in V. & M. Railroad *vs.* O'Brien, 119 U. S., 99, already cited *supra*, this Court said (p. 103):

> "It is, however, claimed, in behalf of the plaintiff's, that in his answers to other interrogatories the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal.

> "*We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury.* In estimating the damages to be awarded in view of the extent and character of the injuries received, *the jury for aught that the court can know, may have been largely controlled by its statements.* The practice of admitting in evidence the unsworn statements of witnesses, prepared, in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence.
>
> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, *it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.* Smith *v.* Shoemaker, 17 Wall., 630, 639; Deery *v.* Cray, 5 Wall. 795; Moores *v.* Nat. Bank, 104 U. S. 625, 630; Gilman *v.* Higby, 110 U. S. 47, 50."

As we have already pointed out, the error in the admission of testimony in the case just cited was *much less consequential* than this error in the present case—and yet this Court, in the cited case, specifically declined to classify the error there committed as harmless. We have in this instance a *clear and sharp conflict* between (1) the ruling of this Court in the cited

case and (2) the ruling of the Circuit Court of Appeals in the present case.

The rule in question is thus restated by this Court in Columbia & Puget Sound R. R. Co. *vs.* Hawthorne, 144 U. S., 202 (p. 208):

> "As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and *it cannot be known how much the jury were influenced by it*, its admission requires that the judgment be reversed."

To this effect, see also Mexia *vs.* Oliver, 148 U. S., 664, wherein this Court said (p. 673):

> "We cannot say that these errors were immaterial, as *it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs.* Deery *v.* Cray, 5 Wall. 795, 807; Gilmer *v.* Higley, 110 U. S. 47, 50."

In this connection, see also Fillippon *vs.* Albion Slate Co., 250 U. S., 76, wherein this Court said (p. 82):

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

This Court has recently recognized that the rule stated by the foregoing authorities *has not been*

changed by the provisions of the act of February 26th, 1919, amending Jud. Code, §269 (now U. S. C., Title 28, § 391), and providing that there shall be no reversal for technical errors not affecting the substantial rights of a party.

In United States *vs.* River Rouge Improvement Co. *et al.*, 269 U. S., 411, this Court thus described the effect of this statute (p. 421):

> "We need not enter upon a discussion of the divergent views which have been expressed in various circuit courts of appeals as to the effect of the Act of 1919. It suffices to say that *since the passage of this Act, as well as before,* an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is to be held a *ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.* See Yazoo Railroad *v.* Mullins, 249 U. S. 531, 533; Fillippon *v.* Albion Slate Co., 250 U. S., 76, 82."

To the same effect, see also the very recent case of Williams *vs.* Great Southern Lumber Co., 48 S. Ct., 417 (decided April 18, 1928), wherein this Court declined to classify errors in the exclusion and admission of evidence as not prejudicial, saying (p. 419):

> "The judgment was properly reversed on account of these errors. This was not affected by the provision of § 269 of the Judicial Code, as amended in 1919, that in an appellate proceeding judgment shall be given after the examina-

tion of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company. *Since the passage of this act, as well as before,* an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, 'is to be held a *ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice* the rights of the complaining party.' United States *v.* River Rouge Co., 269 U. S., 411, 421, 46 S. Ct. 144, 148, 70 L. Ed. 339. *Here it cannot be said from the entire record that the errors were harmless;* but on the contrary they were material and of a highly prejudicial character."

As these citations show, this Court established in its early days the rule that error cannot be classified as "not prejudicial error" unless upon a finding that it is *"so clear as to be beyond doubt"* that the error did not and could not have affected the result in the trial court; and *this Court has thereafter consistently applied and enforced this principle.* The ruling of the Circuit Court of Appeals which we here assail is *based upon no such positive finding, but rather upon mere speculative inferences* to the effect that, although there was concededly a *sharp and substantial conflict* in the testimony properly admitted upon the issue of injury, the jury finding for the plaintiff on this issue should

be deemed to rest entirely upon the testimony properly admitted, and not at all upon the testimony improperly admitted. This simple statement of the theory upon which the Circuit Court of Appeals classifies this error as "not prejudicial error" is sufficient to *demonstrate the conflict* between (1) the ruling of that Court herein and (2) the decisions of this Court upon the subject.

Earlier decisions of our Circuit Court of Appeals, unlike its present decision, recognize and apply properly the rule enunciated by the decision of this Court as to the classification of error in the admission of testimony as harmless error. To this effect see the following:

Antietam Paper Company *vs.* Womble, 294 Fed. (5th C. C. A.), 795.

Klein *vs.* Darnell, 239 Fed. (5th C. C. A.), 844.

T. & P. Railway Co. *vs.* Hartford Fire Insurance Co. *et al.*, 230 Fed. (5th C. C. A.), 801.

In the very recent case of V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2) (5th C. C. A.), 114, cited *supra*, this *same Court* was confronted with the *identical situation* here involved—the properly admitted testimony of the doctors was *sharply conflicting* upon the issue of injury and hearsay testimony had been erroneously admitted on behalf of the plaintiff upon this issue. The court there properly declined to classify the error as harmless upon the speculative inferences in which it has erroneously indulged in the present case, and said (p. 115):

> "The testimony of a number of doctors as to the extent of plaintiff's injury was very much in conflict. Necessarily that favorable to him depended largely upon his own statements as to his deafness. *It is impossible to say what effect the admission of this certificate had upon the minds of the jurors, in enabling them to resolve any conflict in the evidence.*"

The departure by the Circuit Court of Appeals in the present case from its prior habit of observing the rule stated by the decisions of this Court as to the classification of error as harmless, is clearly sufficient to warrant a review of the present case by this Court.

Even the rather incomplete analysis of the testimony in question by the Circuit Court of Appeals (R., 621-622) is sufficient to show that this holding of that court amounts to a *radical departure from the rule settled by numerous decisions of this Court* as to the classification of error as harmless error. A full analysis of this testimony makes this conclusion even more apparent.

There is *ample precedent* for a full examination of the testimony in the record on this phase of the case, if this Court sustains our obviously correct contention that the District Court erroneously violated the fundamental principles of the hearsay rule when it permitted plaintiff to testify to the jury concerning statements made to him by his physicians. To this effect see Y. & M. V. R. R. *vs.* Mullins, Admx., 249 U. S., 531 (p. 532):

> "It is true generally in cases coming from lower Federal courts that the rendering of an

erroneous decision on a particular question, Fidelity & Deposit Co. *v.* Courtney, 186 U. S., 342, 351; West *v.* Camden, 135 U. S., 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; Seaboard Air Line Ry. *v.* Moore, 228 U. S., 433, 435; United States *v.* One Distillery, 174 U. S., 149, 151; will not entitle the complaining party to reversal, *if it is clear that his rights were not prejudiced thereby.* And this is likewise true of cases coming from State courts. Chicago, Rock Island & Pacific Ry. Co. *v.* Wright, 239 U. S., 548, 551; New York, Philadelphia & Norfolk R. R. Co. *v.* Peninsula Exchange, 240 U. S., 34, 41-42. See Murdock *v.* City of Memphis, 20 Wall., 590. *Whether the case comes from a State court or Federal court, this Court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record;* State questions being left to the decision of the State court in cases coming here from those courts."

As already stated, the testimony thus admitted over our objections included not only plaintiff's statement that *Dr. Rudolph Matas told him he "was suffering with traumatic conjunctivitis,"* but also plaintiff's statement *"I went to Dr. Bloom twice and they told me my eye was getting very bad"* (R., 171-2; Bill No. 5, R., 559-61). The Circuit Court of Appeals says that the jury may have inferred that Dr. Matas' statement to plaintiff was based merely upon the plaintiff's statement to him, and not upon any examination by him of the plaintiff's eyes (R., 622).

This is the *merest speculation*, since the record is silent on the subject. However, no such *inference could possibly be drawn as to the remark which plaintiff attributed to Dr. Bloom*, since plaintiff specifically states that this remark followed two visits by him to that office (R., 172), and that he was taken to Dr. Bloom for an examination of his eyes (R., 171-2).

A brief consideration of the testimony of the three physicians, referred to by the Circuit Court of Appeals as tending to support the jury finding for the plaintiff upon the issue of injury (R., 622), will show that there is *no reasonable basis for speculative inference* of that court that this jury verdict was based entirely upon this admissible testimony, and was not influenced in any way by the erroneously admitted evidence under discussion. The three physicians in question are Dr. Wiltz, Dr. Simms and Dr. Davis.

Dr. Wiltz simply testified that he saw plaintiff a few days after the accident, and found his eyes "red, irritated and watery," and that he referred him to an eye specialist (R., 151-2).

This eye specialist was Dr. Simms, whose diagnosis of the plaintiff's complaint as traumatic conjunctivitis, or inflammation due to an injury to the eyes, is stressed by the Circuit Court of Appeals in its opinion, as a basis for its conclusion that the erroneous admission of the testimony in question was "not prejudicial error." This witness *very frankly admits* that this diagnosis was based entirely upon the history of the case as given to him by his patient, and that he could see

no laceration of the eyes or other evidence showing that the inflammation was traumatic in its origin. To this effect, he testified as follows (R., 163):

"Q. What kind of conjunctivitis was it, traumatic or simple?

A. I diagnosed it as traumatic from the history of the case, but *as far as knowing I can't say.* Conjunctivitis is conjunctivitis. *I diagnosed it as traumatic from the history, the information I got from him.*

Q. What do you mean by traumatic?

A. Inflammation caused by an injury.

Cross-examination.

By Mr. Suthon:

Q. Could you see any evidence in Chatters' eyes to show that this was traumatic conjunctivitis rather than simple conjunctivitis?

A. No, I couldn't.

Q. You saw no evidence of injury to his eyes?

A. Yes, there was evidence, the inflammation was there.

Q. That might have been due to injury or some other cause as far as appearance, is that correct?

A. As far as appearance, yes sir.

Q. Was any laceration of the eye visible?

A. No, sir."

The plaintiff's visits to this physician terminated in the latter part of March, 1926. As a witness, this physician identified a written statement which he had

signed concerning the treatment of the plaintiff which reads in part as follows (R., 165):

> "Begun treatment on Feb. 4, 1926, for traumatic conjunctivitis. *He was discharged as well March* 19, 1926. In my judgment, there will be *no permanent injury* following the condition for which I treated him."

Plaintiff says that he stopped going to see Dr. Simms just about the time of his interviews in question with Dr. Bloom and Dr. Matas (R., 171-2). Accordingly the erroneously admitted testimony ascribes to Dr. Bloom the statement that plaintiff's eye *"was getting very bad,"* and to Dr. Matas the statement that plaintiff was *"suffering with traumatic conjunctivitis"* (R., 171-2), at just about the date when Dr. Simms, plaintiff's own witness, testified that he had discharged plaintiff as well, with no permanent injury (R., 165-6).

This analysis shows that the *erroneously admitted testimony in question really tended to make out a much stronger case for plaintiff than did the properly admitted testimony* of this medical witness for plaintiff. In such a situation, *it surely cannot be "so clear as to be beyond doubt"* (5 Wall., 808) that the jury verdict was not influenced or affected at all by the testimony erroneously admitted.

The other physician whose testimony is referred to by the Circuit Court of Appeals as tending to support the plaintiff's case upon this issue, is Dr. Davis, who did not see plaintiff until June, 1926 (R., 153-5), about *two months after the date of the remarks* attri-

buted by the plaintiff to Dr. Bloom and Dr. Matas. He testified that he removed a piece of glass from plaintiff's eyelid—not plaintiff's eye, as the Circuit Court of Appeals erroneously says—in September, 1926 (R., 154-5, 157-9).

Under cross-examination, this witness very frankly admitted that he did not ascribe the conjunctivitis or eye-inflammation, which he found, to this piece of glass removed from the eyelid, but that he rather ascribed it to particles of foreign matter other than glass, removed from plaintiff's eyes in June, 1926. To this effect, he testified as follows (R., 157):

> "Q. Could conjunctivitis be caused by this foreign body which you removed from his eyes?
>
> A. The foreign bodies I first removed could have caused the conjunctivitis he had at that time.
>
> Q. What were those foreign bodies, Doctor?
>
> A. I can't tell you, in amount, possibly twenty-five or thirty different particles I removed at that time, and they were principally dust, particles of sand and things of that kind.
>
> *Q. Did you notice any foreign bodies that you could identify as glass at that time?*
>
> *A. No, sir.*
>
> Q. Now, this foreign body which you removed in September, 1926, and you identified as glass, could that have caused conjunctivitis?
>
> *A. There was very little conjunctivitis present at that time, so I would say that was not primarily responsible for the conjunctivitis that he had at the time I first saw him.*"

While the testimony of this physician that he found a piece of glass in the plaintiff's eyelid and removed it tended to support the plaintiff's case, his testimony, quoted above, is clearly to the effect that he did not attribute the conjuctivitis, or eye inflammation, to this piece of glass, but rather to particles of foreign matter other than glass removed from plaintiff's eyes. Since defendant is only charged with injuring plaintiff's eyes by causing particles of broken glass to enter same, this latter bit of testimony certainly *does not tend to support the plaintiff's case* on this issue.

The remarks which plaintiff as a witness attributed to Dr. Bloom and Dr. Matas (R., 171-2) concerning the condition of his eyes also conflicted sharply with the testimony of Dr. Hardin, a witness for defendants, to whom the plaintiff went immediately after his visit to Dr. Matas' office (R., 172).

Dr. Hardin testified that he found plaintiff suffering with mild conjunctivitis, with no evidence of injury (R., 300-1). Dr. Crobbin and Dr. Buffington who examined plaintiff's eyes after the institution of the suit, also testified, as witnesses for defendants, that they found no evidence or indication of injury (R., 277, 307).

While the petition charged permanent injury (p. 4-6), all of the expert oculists who testified agreed that there was no permanent injury (R., 158, 165, 286, 303, 308, 311). Counsel for plaintiff accordingly *waived the claim for damages for permanent injury* just before the case was argued to the jury (R., 329). The

case was then submitted to the jury on the issue of temporary injury only (R., 537), and *upon that issue the erroneously admitted testimony discussed above tended to sustain the case of the plaintiff.*

Plaintiff also had the deposition (not mentioned in the opinion of the Circuit Court of Appeals) of a Dr. Carmichael in Washington, who testified to removing small particles of glass from plaintiff's eyes a day or so after the date of the alleged accident (R., 364-74). This physician did not see plaintiff after February 2nd, 1926 (R., 365-7), and his testimony accordingly *threw no light* upon the issue of the condition of plaintiff's eyes several weeks after the accident—*the issue upon which defendants were prejudiced* before the jury through the erroneous admission of the hearsay testimony under discussion. This witness admitted under cross-examination that *there were no lacerations or cuts on plaintiff's eyeballs*, although he testified to small abrasions and contusions on the eyelids (R., 370-1).

The rule against the admission of hearsay testimony is one of the *fundamental and well established principles* of the law of evidence. While there may be appropriate arguments for the relaxation of that rule in some instances, particularly when the party quoted is not available as a witness, that is not the situation here. The rulings of the District Judge admitting this testimony over our specific objections were *obviously erroneous.* The failure of the Circuit Court of Appeals to specifically so hold, and the action of that court in classifying the admission of this evidence as "*not pre-*

judicial error," are both so *clearly at variance with the pertinent decisions of this Court* as to cause this case to clearly merit review here on these issues.

POINT NO. 3.

Erroneous Admission of Letters from Third Persons to Plaintiff on Claim for Loss of Earnings and Improper Classification of This as Not Reversible Error.

This point (Bill No. 10, R., 579-84) involves the principles of (1) the *hearsay rule* and (2) the classification of error as *harmless error,* discussed in the preceding section of this brief. The ruling of which we complain was made upon the introduction of testimony as to the issue raised by the allegation of the petition that the injuries to plaintiff's eyes had caused him to *lose earnings* amounting to $500 as representative of the Mullins River Lumber Company of Central America (R., 5). The Circuit Court of Appeals classifies the ruling as one which *"did not involve reversible error"* (R., 622-624).

The testimony of the plaintiff as a witness on his own behalf tended to show that he was active before the accident as a representative of the concern in question, in an effort to negotiate sales of its products, and that he had succeeded in interesting several prospective buyers who were disposed to purchase (R., 176-8). He further testified that the injury to his eyes prevented him from following up and concluding these deals (R., 178).

The defendants did not dispute plaintiff's employment by this concern. **The sole theory of the defense on this phase of the case is that the concern was** *a mere promotion scheme which never passed beyond that stage,* **and that** *it would not have been able to make deliveries* **upon any contracts for the sale of its products which plaintiff (but for his alleged injury) might have negotiated.**

This theory of the defense is corroborated by the plaintiff's admission that the Mullins River Lumber Company was "*just newly formed*" (R., 176); and also by his admission that his salary of $100 per month was to begin *when "the products were ready for delivery"* (R., 177); and also by his admission that *he had never at any time actually received any compensation whatsoever from the concern* in question (R., 194-5). It is thus evident that, even if the effects of the accident did prevent plaintiff from negotiating sales of the products of the concern in question, *the fact of a pecuniary loss from this depended upon whether plaintiff's principal was functioning as a going concern,* able to make deliveries on contracts for the sales of its products.

The proof on behalf of the defendants (R., 524-30) on this issue is well summarized by the Circuit Court of Appeals in the following language (R., 623):

> **"The defendant introduced in evidence the depositions of two witnesses who resided in Honduras (where the Company mentioned was organized and located), and had knowledge of that Company. Their testimony was to the**

effect that that Company was organized for the purpose of operating a saw mill to convert logs into lumber, *that it had not operated a saw mill or produced anything at the time the depositions were taken*, that plaintiff was employed by that Company and was to get a commission on any business transacted in New Orleans, but he had made no sale and had earned no commissions, and *that that Company was not in a position to fill, by shipment of lumber, any orders for sales of lumber which plaintiff might have obtained* during the months of December, 1925, and January to and including July, 1926."

One of these witnesses, an official of the concern, testified specifically as follows (R., 528):

"Cross-inty. No. 5. What, in your opinion, could Aaron A. B. Chatters, or any other representative, have earned under the aforementioned contract during the first six months of the year 1926, if he had devoted a reasonable amount of time and enegy towards the duties therein stipulated:

"Answer: *We had nothing for him to do and he could have earned absolutely nothing.*"

The other of these witnesses, a resident of Mullins River, testified as follows (p. 530):

"Cross-inty. No. 1. Please state the general nature of business conducted by the Mullins River Lumber Co.?

"Answer. *Not conducting any business, but intend to cut timber.*

"Cross-inty. No. 2. Does it sell or is it able to sell any products of any kind or nature; if so, state the nature of those products?

"Answer. *No.*"

The plaintiff was called as a witness in rebuttal, *for the specific and restricted purpose of rebutting the defendants' proof on this issue* (R., 320). He identified a *letter* of date November 5, 1925, written to him by the secretary of the Mullins River Lumber Company in Central America, and this letter was admitted in evidence and read to the jury, over the *objection* of counsel for defendants that the writer of the letter was *not produced as a witness under oath and was not subject to cross-examination* (R., 323-5).

This letter contains the following specific passages amounting clearly to *assertions of fact by the writer* that the Mullins River Lumber Company was *then functioning as a going concern*, and capable of producing and delivering logs or lumber on any contracts for the sale of its products which Chatters might negotiate (p. 324):

"Your communication of the 27th October, 1925, came safely to hand and we note with satisfaction that *you have succeeded in disposing of all the Mahogany and Cedar we are able of producing.*

* * * * * * *

"*We can make delivery in almost short notice.*"

This letter was introduced in evidence *for the specific purpose of rebutting the defendant's depositions*

on this point, as summarized above, and the suggestion of the Circuit Court of Appeals that nothing in the letter rebutted or conflicted with the defendant's depositions (R., 623-4) is *at variance with the plain language of the letter.* The letter specifically said "Yes" and the deposition specifically said "No" on the question: "Was the plaintiff's principal a going concern capable of fulfilling, to plaintiff's profit as a salesman, any contracts which he might negotiate for the sale of its products?"

In the recent case of Leach & Company *vs.* Pierson, 275 U. S., 120, this Court held that a letter written by one litigant to the other litigant is not admissible in evidence on behalf of the writer, as proof of the asserted facts therein set forth. To this effect this Court said (p. 128):

> *"A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts."*

Paraphrasing the language thus used by this Court, we submit that a man is equally barred from making evidence for himself by producing letters written to him by some third person and containing assertions of fact, *when the writer of the letter does not appear as a witness, under oath and subject to cross-examination.*

This letter from this Central American promoter was certainly a *much less authentic document* than

the army discharge which the plaintiff put in evidence in the case of V., S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, cited *supra*. Our Circuit Court of Appeals in that case held this to be *reversible error*, since the army discharge was an *ex parte* document, and the defendant had no opportunity to cross-examine the author of the statements therein contained. The ruling in that case *clearly conflicts* with the ruling in the present case admitting the letter in question.

The ruling admitting the letter in question in evidence in the present case is also at variance with numerous authorities on the subject, from which we quote and cite the following:

> *Texas Company vs. Brilliant Manufacturing Company*, 2 Fed. (2), (3rd C. C. A.), 1 (p. 2):
>
> "Defendant further contends that the trial judge erred in refusing to admit the plaintiff's letter of March 26, 1923, to the H. D. Beach Company and its reply. Considering the reply first, we do not see any theory under the facts on this case on which it was admissible. *It was not under oath and not subject to cross-examination.* The Beach Company was not a party to the suit, and what it said could in no way bind the plaintiff any more than what plaintiff said to the Beach Company could bind the defendant. The testimony of the Beach Company was available, and *if the defendant desired in evidence the contents of the letter, testimony should have been taken under oath in the usual way. The offer was properly overruled.*"

Consolidated Grocery Company et al. vs. Hammond, 175 Fed. (5th C. C. A.), 641 (p. 645):

"The letter, having been written by a third person, without the knowledge of the defendants, and without their subsequent sanction or approval, seems to us to be *hearsay testimony*, so far as the defendants are concerned, and, for that reason, *inadmissible* against them. Nevada Company *vs.* Farnsworth, 102 Fed. 573, 42 C. C. A. 504; Dwyer *vs.* Dunbar, 5 Wall. 318, 18 L. Ed. 489; Insurance Company *vs.* Guardiola, 129 U. S. 642, 9 Sup. Ct. 425, 32 L. Ed. 802; 1 Greenleaf on Evidence (16th Ed.), § 98 *et seq.*; 2 Wigmore on Evidence, § 1361 *et seq.*"

Great Southern Lumber Company *vs.* Williams, 17 Fed. (2), (5th C. C. A.), 468, affirmed 48 S. Ct. 417.

Security Trust Company *vs.* Robb *et al.*, 142 Fed. (3rd C. C. A.), 78.

Nevada Company *vs.* Farnsworth, 102 Fed. (8th C. C. A.), 573.

This principle is merely another detailed application of the fundamental rule against the admission of hearsay testimony (a rule which the Circuit Court of Appeals in the present case disregarded.

The assertion of the Circuit Court of Appeals that the ruling admitting the letter in question "did not involve reversible error" is *entirely demolished* by quoted language of the document itself. The authorities which we have cited and quoted in the preceding section of this brief as to the circumstances which will

justify an appellate court in classifying the erroneous admission of testimony as "not reversible error," are pertinent also to the point now under discussion. Under these authorities, the Circuit Court of Appeals is clearly wrong in classifying the erroneous admission of this letter in evidence as a ruling which "did not involve reversible error." On this point, also, the case merits review here because of the conflict between the jurisprudence of this Court and the ruling of the Circuit Court of Appeals herein.

Point 4.

Erroneous Denial of Peremptory Instruction on Count for Loss of Earning.

At the conclusion of the evidence, the defendant moved for a peremptory instruction withdrawing from the jury the plaintiff's claim for $30 a month for loss of earnings as representative of the Indian [illegible] Lumber Company (R. 29). The district judge denied the motion and it was duly reserved (R. 31, 32, 34-37). The Circuit Court of Appeals approved this ruling, holding that the case was a proper one for the jury (R. 53).

The testimony upon this question for a statement as follows: [illegible] while the plaintiff was contemporaneously acting as representative of the estate, he as a salaried employee received [illegible] at the time of the accident (R. 19), and he was [illegible] from this source [illegible]

upon the ability of this concern to make deliveries of its products under such contracts as the plaintiff might negotiate (R., 177).

The plaintiff himself admitted that the concern was "just newly formed" (R., 176). The depositions which the defendant took in Central America (R., 324-30)—the only sworn testimony by witnesses having knowledge of that locality—were to the effect that this concern was a *mere promotion scheme which had not passed beyond that stage*, either at the time of plaintiff's alleged disability or thereafter, and which never had any products to deliver.

The only real *possible contradiction* of these depositions is found in the *erroneously admitted letter* written to plaintiff by a Central American representative of this concern (R., 324-5), which contains statements as to the ability of this concern to produce and to deliver lumber to customers whom the plaintiff might find. The error in the admission of this letter has been discussed in the foregoing section of this brief.

If we take the view of this letter erroneously taken by the Circuit Court of Appeals, that nothing therein "rebutted or was in conflict with the testimony contained in the depositions introduced by the defendants" (R., 627), then there is no contradiction whatsoever of defendants' proof to the effect that this concern was a mere promotion scheme, never able to pay salaries or commissions dependent upon its ability to make actual deliveries of logs or lumber. *Thus puts the Circuit Court of Appeals in this dilemma: if its ruling on the admission of the letter is correct, then*

its ruling on the motion to direct a verdict for defendants upon this item of the claim is erroneous; and its ruling on this motion to direct a verdict can possibly be correct only its its ruling on the admission of the letter be erroneous.

Since the plaintiff's ability to earn money as a representative of this concern was dependent upon the concern's ability to deliver its products to customers found by the plaintiff; since the only sworn testimony in the record on the subject is to the effect that the concern was a mere promotion scheme which never had any products to deliver (R., 524-30); and since the only possible proof to the contrary is a letter erroneously admitted (R., 324-5), without the attestations of even the *ex parte* oath of the writer, we submit that the case comes within the rule (Small Company *vs.* Lamborn & Company, 267 U. S., 248; Martin *vs.* I. C. R. R. Co., 23 Fed. (2) (5th C. C. A.), 324; Hardy-Burlingham Mining Company *vs.* Baker, 10 Fed. (2) (6th C. C. A.), 277) that in the Federal courts, upon a motion for peremptory instructions, a *mere scintilla or modicum of conflicting evidence* does not entitle the adverse party to go to the jury.

The record contains *no real, definite and positive testimony* tending to support the contention that this concern functioned actively and was able to make deliveries and did actually make deliveries (a condition precedent to plaintiff's receiving compensation from this source) during the period of plaintiff's alleged disability. The following comments are accordingly ap-

propriate upon the case for the plaintiff upon this issue.

Noble vs. Crane & Company, 169 Fed. (6th C. C. A.), 55 (p. 59):

> "So that it is the duty of the court to direct a verdict unless the conflict is positive. The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the reason of the court, which does not have substance and relevant consequence, which does not have fitness to induce conviction, is not proof, even if uncontradicted, and does not interfere with the duty of the court to direct a verdict."

Minahan vs. Grand Trunk Railway, 138 Fed. (6th C. C. A.), 37 (p. 46):

> "And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to induce conviction."

Upon the foregoing, we respectfully submit that the District Court erred when it permitted the plaintiff to go to the jury on his claim for loss of earnings as the lumber salesman of a promotion scheme which provenly never passed beyond that stage, and that approval of this ruling by the Circuit Court of Appeals is erroneous, and in conflict with the cases cited, *supra,* on this point.

Point No. 5.

Erroneous Peremptory Charge on Joint Liability.

While the District Judge left the question of negligence to the jury (R., 537-8), *he peremptorily charged that the operation of the through train in question by the defendants was a joint enterprise, in the nature of a partnership, and that the liability of defendants to the plaintiff was a joint liability.* To this effect, he said (R., 541):

> "• • • in this case the selling or initial carrier, the selling agency, the Louisville & Nashville Railroad Company did something more than merely sell the ticket. It participated in the *joint operation of the train, a sort of partnership.*
>
> • • • • • • •
>
> "Under the circumstances as they are shown here the liability of these two defendant carriers is *joint.*
>
> • • • • • • •
>
> "Here is a *joint enterprise* in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. *They assumed the obligation jointly* with this plaintiff to deliver him in Washington safely in this particular train."

The L. & N. excepted to this charge (Bill No. 4, R., 553-8) upon grounds fully discussed in its concurrent

application for certiorari in this case. The Southern also excepted to the charge (Bill No. 16, R., 601-6) *"in so far as it makes the Southern Railway Company responsible for negligence of the Louisville & Nashville Railroad Company."*

The charge in question was approved in the opinion of the Circuit Court of Appeals. The critical comment in that opinion upon the length of the portion of the charge embodied in this bill (R., 624), is without justification. *The district judge elaborated at considerable length upon his theory of joint liability and his reasons for so charging.* Each defendant *specifically excepted* to the charge imposing a joint liability on the defendants (R., 545-6), but in the preparation of the bills (Bill No. 4, R., 553-8; Bill No. 16, R., 601-6), in justice to the plaintiff and to the district judge, counsel for defendants *naturally and properly reproduced all of the discussions and comment in the charge on the subject of joint liability and the so-called joint enterprise.*

The charge on joint liability has been fully discussed in the L. & N.'s concurrent application for certiorari, and the authorities cited there are pertinent upon our complaint as to this charge also. We desire to add the following to the citations made by the counsel for the L. & N. on this point:

> *Pennsylvania Railroad Company vs. Jones,* 155 U. S., 333:
>
> "It is the duty of a railroad company, running its trains in connection with other lines, and taking passengers and freight for transpor-

> tation to points upon connecting lines, to carry them safely to the end of its own line, and there deliver them to the next carrier in the route beyond, and, *in the absence of a special agreement to extend its liability beyond its own lines, such liability will not attach;* and such agreement will not be inferred from doubtful expressions or loose language, but it must be established by clear and satisfactory evidence."

This charge on joint liability is also *clearly at variance with the decisions of this Court* which we have cited in arguing our plea to the jurisdiction (Peterson *vs.* C., R. I. & B. Ry. Co., 205 U. S., 364; Philadelphia & Reading Co. *vs.* McKibben, 243 U. S., 264; General Investment Company *vs.* Lake Shore & M. S. Ry. Co., 260 U. S., 261, affirming 250 Fed. (6th C. C. A., 160), to the effect that the sale of through tickets and the operation of through trains and through cars is *not such a joint enterprise* as to give to the connecting carrier the status of doing business in the State where the tickets are sold by the initial carrier.

The charge embodying this theory of joint liability was clearly erroneous and this error was *clearly prejudicial to the Southern.* Under the charge as given, the jury was told in substance to return a verdict against both defendants, upon a finding of negligence on the part of either. Since each defendant denied negligence, and since the judge left the question of negligence to the jury, the verdict against both defendants *may have represented a finding that only one defendant was actually negligent.* For example, the jury

may have concluded that the L. & N. was negligent in the inspection of the car and in the preparation of the train at New Orleans, and that the Southern used reasonable care in its inspection and handling of the car from Atlanta to the point of the accident (R., 401-524) and was itself guilty of no negligence.

The evidence showed that the train was *inspected by the Southern* when it reached that line at Atlanta, and also at several points between that point and the point of the accident (R., 401-524; R., 590-1). This inspection, in so far as the screen in question were concerned, was made by a railroad employee who walked along the ground beside the train and looked at the sides of the cars, seeking to observe anything loose or out of order. Such an inspection, however, as to a train in transit was *the only inspection which could be made "consistently with the conduct of the carrier's business."* It was clearly permissible for the jury to find from this evidence that the Southern, as a connecting carrier, had performed its duty of inspection as defined as follows in 10 C. J., 953:

> "The care required as to roadbed, track, machinery, and appliances is not fully exercised by an originally safe construction, but involves such constant inspection for the purpose of discovering defects or dangers which may be developed in the operation of the road, and in remedying the same, as the highest degree of care and foresight would suggest, so far as practicable, *consistently with the carrying on of the carrier's business*, and a neglect of this duty renders the carrier liable to passengers

> who may be injured by reason of any defect which might have been discovered by such inspection. This inspection with respect to both its mode and frequency must be such as can be done consistently with the conduct of the carrier's business. The frequency of inspection is dependent on the liability to impairment, the consequences of which may be apprehended as a result of defective conditions; but *the carrier is not required to keep up a continuous inspection, or to know at each moment the condition of every part of a train.*"

Even if it be assumed that the issue of the Southern's liability, upon its own negligence, was for the jury, *the Southern was at least entitled to have the jury consider this issue unprejudiced by erroneous instruction authorizing the jury to find against the Southern upon the theory of "joint liability," even though it might conclude that the L. & N. was the only negligent defendant.*

Upon the foregoing we respectfully submit that the peremptory charge on joint liability given by the district judge was erroneous and that this error was prejudicial as to the Southern. The importance of the question of law erroneously decided by the Circuit Court of Appeals is such as to make the case properly reviewable here on certiorari.

Conclusion.

For the foregoing reasons, we respectfully submit that a writ of certiorari should be granted herein, in

order that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be review and reversed by this Court.

Respectfully submitted,

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APPENDIX A.

Analysis of Cases Relied Upon by District Judge in Overruling Plea to Jurisdiction, But Not Cited by Circuit Court of Appeals.

Two of these cases pass upon the jurisdictional question as to suits in a State court, and not as to suits in a Federal court (St. Clair *vs.* Cox, 106 U. S. 350, and Connecticut Mutual Life Insurance Company *vs.* Spratley, 172 U. S., 602). In the first case the State judgment was held not enforcible under the full faith and credit clause, because of a lack of any proof that the defendant foreign corporation was doing business in the State. In the second case, jurisdiction was maintained upon the finding that the foreign corporation was doing business in the State. In the latter case, the suit arose out of business done in the State and the foreign corporation had actually designated an agent for service of process there. Neither of these rulings touch the issue here presented.

In Mexican Central Railway Company *vs.* Pinkney, 149 U. S. 194, this Court held that a State statute giving to a special appearance by a plea to the jurisdiction the effect of a general appearance, is inapplicable to proceedings in the Federal courts. As was there said, it is manifestly beyond the power of a State legislature to deprive a person of the right guaranteed to him by the Federal statutes to have the jurisdictional question preserved for review on appeal in Federal court litigation.

All that is held in Munster *vs.* Weil Corset Company, 261 U. S., 276, and Mechanical Ap. Co. *vs.* Castleman, 215 U. S. 437, is that when a defendant attacks the validity of the service of process, after removing the case to the Federal court, the procedure whereby this

attack is made is governed by the general principles of Federal law, and not by the State rule of practice.

In Walsh *vs.* Atlantic Coast Line Railroad Company, 256 Fed. (D. C. Mass.) 47, it was held that a foreign railroad corporation found to be doing business in Massachusetts, but having no designated agent for the service of process there, is subject to suit in that court on a cause of action arising in Florida. This ruling is clearly at variance with the decisions of this Court in Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S. 8, and Simon *vs.* Southern Railway Co., 236 U. S. 115, to the effect that even if a foreign corporation is doing business in the State, its liability to suit there is necessarily restricted to causes of action there arising, if it has not designated an agent for service of process.

In Conley *vs.* Mathieson Alkali Works, 190 U. S. 406, the plea to the jurisdiction was maintained upon the familiar ground that the corporation was doing no business in the State and the officer served with process had come into the State for some other object than the transaction of corporate business. The same principle controlled the decision in Goldey *vs.* Morning News, 156 U. S. 518, wherein this Court refused to follow certain State decisions which upheld jurisdiction in a case of that character. Since these State rulings are clearly violative of the "due process" clause, it is easy to understand why this Court declined to follow them.

Office Supreme Court,
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No. 415

United States Supreme Court

OCTOBER TERM, 1928

SOUTHERN RAILWAY COMPANY ET AL.,
Petitioners,

versus

AARON A. B. CHATTERS,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONERS.

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HAUSER PRINTING CO., NEW ORLEANS

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SOUTHERN RAILWAY COMPANY ET AL.,
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versus

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Respondent.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONERS.

May it please the Court:

JURISDICTIONAL SHOWING.

The opinions below herein are reported as Chatters *vs.* Louisville & Nashville Railroad Co. *et al.*, 17 Fed. (2) (D. C. E. D. La.) 305, and Louisville & Nashville Railroad Co. and Southern Railway Co. *vs.* Chatters, 26 Fed. (2) (5th C. C. A.) 403. The case is here on writs of certiorari granted (49 S. Ct. 26) in the present proceedings, and in the concurrent application for review filed by the Louis-

ville & Nashville Railroad Company in case No. 414 on the docket for this term.

This case is within the certiorari jurisdiction of this Court under the provisions of United States Code, Title 28, § 347 a (formerly Judicial Code, § 240 a). The judgment of the Circuit Court of Appeals now under review was rendered on June 2, 1928 (R., 424-32), and that Court denied a petition for rehearing on July 10, 1928 (R., 433). The petition for certiorari was filed here on September 6, 1928.

Since the case is here on writ of certiorari to a United States Circuit Court of Appeals, this Court has the power to pass upon *all questions arising on the record* (Donovan *vs.* Pennsylvania Co., 199 U. S., 279, 292). The points which we urge are (1) a plea to the jurisdiction (R., 7-8, 11-2, 23-4), which was overruled in the District Court (R., 11, 17-23, 25-26), and this ruling was affirmed by the Circuit Court of Appeals (R., 424-6); and (2) several rulings upon the trial of the case on the merits involving objections to the admissibility of certain evidence and the giving of charges to the jury (Bill No. 5, R., 385-7; Bill No. 10, R., 400-3; Bill No. 11, R., 403-5; Bill No. 16, R., 415-9), which rulings were deemed by the Circuit Court of Appeals not to involve any reversible or prejudicial error (R., 429-32). After the plea to the jurisdiction was overruled, this question was saved in the answer of the defendant (R., 27), and the record will show that all of the points here urged have been properly raised and properly preserved. All of points argued in this brief were *presented in the application for certiorari* (Alice State Bank *et al. vs.* Houston Pasture Co., 247 U. S. 240, 242).

STATEMENT OF CASE.

This action was instituted in the United States District Court for the *Eastern District of Louisiana* by Chatters, a citizen of Louisiana, against the Louisville & Nashville Railroad Company, a Kentucky corporation, and the Southern Railway Company, a *Virginia corporation* (R., 1-4). For the sake of brevity, we will refer to the defendants as the "L. & N." and the "Southern," respectively.

The plaintiff claimed damages in the sum of $36,087, on account of alleged injuries to his eyes by particles of glass from a broken window pane in a railroad car. *This accident occurred at a point in Virginia, on the line of the Southern.*

The plaintiff, on this trip in question, travelled from New Orleans, La., to Washington, D. C., *on a through coupon ticket purchased by him from the L. & N. in New Orleans*, which entitled him to transportation over that line from New Orleans to Montgomery, Ala., over the line of the Atlanta & West Point Railroad Company and the Western of Alabama Railway Company (hereinafter collectively termed the "A. & W. P.") from Montgomery, Ala., to Atlanta, Ga., and *over the line of the Southern from Atlanta, Ga., to Washington, D. C.* (R., 2, 113-4, 177-82). He made the entire trip on a *through train* called the "Piedmont Limited," operated over these railroad lines between New Orleans and Washington through the intermediate points just mentioned (R., 113-4, 155-6, 207-14).

The accident in question occurred in Virginia, on the Southern's line, about two hours' journey south of Washington (R., 2, 152, 163-4). An outside screen on one

window of the car in which plaintiff was riding became detached and swung against the glass of an adjacent window, breaking it (R., 2, 114, 154, 163-4).

Process against the Southern was *served upon the agent designated by it pursuant to Louisiana statutory provisions* (R., 8). The Southern *excepted to the jurisdiction*, upon the ground that the cause of action against it *did not arise out of any business done by it in Louisiana*, and that, as a foreign corporation which has designated an agent for service of process in Louisiana, it is *suable there only upon causes of action arising out of business done by it within that State* (R., 7-8, 11-2, 23-4). The evidence shows that while the Southern has designated an agent for service of process in Louisiana and maintains an office there for the solicitation of freight and passenger business for its railroad lines in other States, *it does not itself own or operate any railroad lines in that State* (R., 67-100). This exception was overruled by the District Court (R., 11, 17-22, 25-6).

The L. & N. interposed certain special defenses which will be fully detailed in the application for certiorari filed concurrently herewith by that defendant.

The case was tried before a jury, which returned a verdict for $3,087 against both defendants (R., 37-8), after plaintiff had waived his claim for $25,000 for alleged permanent injuries to his eyes (R., 235, 370). A motion for a new trial was denied (R., 39-40). Both defendants then prosecuted writs of error to the United States Circuit Court of Appeals for the Fifth Circuit (R., 40-1, 47). The Southern assigned as error the overruling of its exception to the jurisdiction, as well as the other rulings

herein complained of (R., 48-63). The L. & N. joined in some of these assignments (R., 53-63) and assigned other errors peculiar to its own defenses (R., 41-6).

The circuit court of appeals held that no reversible error had been committed as to either defendant, and affirmed the judgment (R., 424-32). Motions for rehearing by both defendants were denied (R., 433).

SPECIFICATION OF ERRORS URGED

(1). The overruling of the plea to the jurisdiction (R., 7-8, 11-2, 17-26, 424-6), and the holding that a foreign corporation is subject to suit in a Federal District Court, through service of process upon the *agent designated by it pursuant to State statutory requirements*, although *the cause of action does not arise out of any business done by this foreign corporation within that State*, and although the State rule of law is that *an implication of consent to be sued* results from this designation of an agent for service of process *only quoad causes of action arising out of business done within that State.*

(2). The admission of plaintiff's testimony as to *statements assertedly made to him by two physicians* (not sworn as witnesses) concerning the condition of his eyes, over the objection of defendants that this was *inadmissible hearsay* (Bill No. 5, R., 385-7), and the holding of the Circuit Court of Appeals that these rulings were *"not prejudicial error"* (R., 429-30).

(3). The admission, upon the issue of plaintiff's asserted loss of earnings as a representative of the Mullins River Lumber Company of British Honduras, of a letter from an officer of that concern (not sworn as a witness)

to plaintiff, containing *asserted statements of fact* tending to support the plaintiff's case on this issue, over the objection that *this letter was inadmissible as proof of the asserted facts therein recited* (Bill No. 10, R., 400-3; R., 232-3), and the holding of the Circuit Court of Appeals that this ruling *"did not involve reversible error"* (R., 430-2).

(4). The *denial of defendants' motion to instruct the jury to find for defendants* upon plaintiff's claim for $500 as asserted loss of earnings as a representative of the Mullins River Lumber Company (Bill No. 11, R., 403-5), and the approval of this ruling by the Circuit Court of Appeals (R., 432).

(5). The charge of the District Judge to the jury that the defendants in this case are *jointly liable* to plaintiff under the contract of carriage in question, to which the Southern excepted upon the ground that *this erroneously imposed upon it a liability for the consequences of the negligence of the L. & N.* (Bill No. 16, R., 415-9); and the approval of this charge by the Circuit Court of Appeals (R., 432).

We will now discuss the foregoing points *seriatim*.

POINT NO. 1.

Plea to Jurisdiction.

STATEMENT OF PLEA.

The exception of the Southern to the jurisdiction rests upon the three following propositions:

(A) That when a foreign corporation, sued in a Federal district court, has *designated an agent for service of process pursuant to State statutory provisions*, the Federal court will recognize *the limitations fixed by State law* as to the jurisdiction acquired *quoad* such a defendant, through service upon this designated agent.

(B) That, under the *Louisiana law*, a foreign corporation, which has designated an agent for service of process, pursuant to State statutory provisions, is *subject to suit in the Louisiana courts only upon causes of action arising out of business done in that State*, and not upon causes of action arising elsewhere.

(C) That the present cause of action, *insofar as the Southern is concerned, does not arise out of any business done by the Southern in Louisiana*, but arises entirely out of business done by that corporation outside that State.

FACTS.

The facts upon the jurisdictional issue are simple and undisputed. While the plaintiff purchased from the L. & N., in New Orleans, a through ticket for a trip from that point to Washington, *this ticket did not entitle him to transportation by the Southern until he reached Atlanta* (R., 2, 113-4, 177-82). The L. & N., which sold this ticket in New Orleans and which transported this passenger from that point to Montgomery, and the Atlanta & West Point, which transported him from Montgomery to Atlanta, are both corporate entities, *entirely separate and distinct from the Southern*, and are not subsidiaries of the Southern (R., 85). *The Southern received this passenger at Atlanta and transported him from that point to Washington* (R.,

2-3, 156, 177-82). The accident occurred at some point in Virginia about two hours' south of Washington (R., 2, 152, 163-4).

The trip was made on a through train operated between New Orleans and Washington, over the lines of the three railroads in question (R., 113-4, 155-6, 207-14). The plaintiff rode in the same car for the entire length of his journey (R., 113-4). This car was the property of the Southern (R., 155).

The Southern itself operates no railroad lines at all within the State of Louisiana (R., 67-8). Railroad properties within that State are owned and operated by the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company, which are separate corporate entities and function as such, and practically all of the stock in these corporations is owned by the Southern (R., 67-85). *Neither of these lines participated at all in the movement of this passenger.* The Southern maintains passenger and freight soliciting offices in New Orleans, along with a number of other affiliated railroad corporations such as the two just named, and this office solicits freight and passenger business for the lines of the Southern itself, which are located entirely outside of Louisiana (R., 70). *The Southern has designated a Louisiana agent for service of process, in accordance with the State statutory provisions on the subject* (R., 17, 67), *and process in this suit was served upon that agent* (R., 17).

Point No. 1 A.

Plea to Jurisdiction.

Federal Courts Follow State Rule as to Jurisdiction in Suit Against Foreign Corporation Served Through Designated Agent for Service of Process.

The main basis of the ruling against us on the jurisdictional issue, both in the District Court (R., 17-22), and in the Circuit Court of Appeals (R., 424-6), is the holding that when a foreign corporation is doing business within a State and has designated a statutory agent for service of process there, and when the requisites peculiar to Federal district court jurisdiction are present (in this case, diversity of citizenship, amount involved more than $3,000, and district of plaintiff's residence), the Federal district court has jurisdiction, *regardless of the situs of the origin of the cause of action and regardless of the State rule on the subject.*

The pertinent Federal statutes on this subject read as follows:

U. S. Code, Title 28, § 41 (Judicial Code, § 24):

> "The District Courts shall have original jurisdiction, as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity * * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and * * * * (b) is between citizens of different States * * * *."

U. S. Code, Title 28, § 112 a (Judicial Code, § 51 a):

> "* * * * where the jurisdiction is founded only on the fact that the action is between citizens

> of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Your Honors will note that the statutes quoted above deal with the subject of jurisdiction *in general terms only. Nothing is there said about the issue here involved—the extent of the implication of consent to be sued* resulting from the fact that a foreign corporation has appointed a statutory agent for service of process in connection with its operation in a state other than that of its domicile.

We submit that the rulings below upon this issue are in conflict with a number of decisions of this Court, cited hereinafter, and we place particular emphasis in this connection upon the *two recent cases of* Mitchell Furniture Co. *vs.* Selden-Breck Construction Co., 257 U. S., 213, and Missouri Pacific Railroad Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533.

In supporting this ruling, the district judge cited (R., 17-22) quite a number of authorities, but the Circuit Court of Appeals (R., 424-6) confined itself to *one citation,* Barrow Steamship Co. *vs.* Kane, 170 U. S., 100. This was a suit by a citizen of New Jersey in a New York Federal court against a foreign corporation doing business in New York. Plaintiff claimed damages for an assault upon him by employees of defendant at Londonderry, Ireland, in the course of a voyage from Londonderry to New York. Service was made upon the agents having charge of defendant's business in New York, but it was *not shown that the defendant had designated a statutory agent* for service of process in that State (170 U. S., 104).

The defendant questioned the jurisdiction, invoking the rule of State law (170 U. S., 104-5) that a *non-resident plaintiff* could not sue a non-resident defendant in the New York State courts, except upon a cause of action arising in that State. This Court held this restriction inapplicable to an action in a Federal court, saying (p. 112):

> "The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts *by citizens and residents of other States* cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States."

The cited case does not involve the situation here presented—a *resident plaintiff* seeking to sue a foreign corporation in a Federal district court, *although such a suit could not have been maintained by this resident plaintiff in a court of his own State, having the same territorial jurisdiction*, because of the foreign situs of the origin of the cause of action. On the contrary, the State statute involved in the cited case (170 U. S., 104), *discriminated between resident plaintiffs and non-resident plaintiffs*, permitting the former to sue a foreign corporation doing business in the State upon any cause of action, but permitting the latter to sue such a defendant only upon a cause of action arising within the State. This Court recently condemned such a discrimination against non-resident plaintiffs in Missouri-Pacific R. R. Co *vs.* Clarendon Boat Oar Co., 257 U. S., 533, saying (p. 535):

> "Under § 2 of Article IV of the Federal Constitution, the citizens of each State are entitled to all privileges and immunities of citizens in the several

> States. *This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.*"

This *lone decision* cited by the Circuit Court of Appeals was rendered thirty years ago, at a time when the development of the law governing jurisdictional questions in suits against foreign corporations was *still in its early stages*. All of the other and even less pertinent decisions of this Court cited on this point by the district judge were rendered in the *same era*.

The decision in the Barrow Steamship Company case was rendered *before this Court decided* (Old Wayne Mutual Life Assn. *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Ry Co., 236 U. S., 115) that when a foreign corporation does business in a State *without designating* the required statutory agent for service of process, its presumed assent to being sued there is *strictly limited to causes of action arising out of business done by it within that State*. Since the foreign corporation in the Barrow Steamship Company case was not shown to have designated an agent for service of process in New York (170 U. S., 104), a *different result* would have been reached in that case by the application of the doctrine *subsequently developed* in these two later cases.

The next step in the *progressive development* of the law on this subject was Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. This Court there held that, *when a foreign corporation has designated an agent* for service of process pursuant to State statutory requirements, *it is for the State to determine whether this agency covers service of process only*

in suits arising out of business done within the State, or whether this agency extends to service of process in all transitory actions, however and wherever arising. This Court assimilated the appointment of a statutory agent for service of process to the *creation of an agency by a written document*, the terms of which are subject to State judicial interpretation. To this effect it said (p. 96):

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."

This doctrine puts the plaintiff here in an *inconsistent position*. If the Southern had not designated an agent for service of process in Louisiana, *it is extremely doubtful whether it would have been suable in Louisiana at all*, since the record shows (R., 105-9) that the only business which the Southern itself transacts in Louisiana is the soliciting of freight and passenger business for the benefit of its own railroad lines located entirely outside the State (Green *vs.* C. B. & Q. R. R. Co., 205 U. S., 530; Davis *vs.* Farmers Co-operative Equity Company, 262 U. S. 312). In the absence of such a designation of a statutory agent for service of process, this foreign corporation would have been suable in Louisiana, if at all, *only upon causes of action arising out of the business transacted by it in that State and not upon causes of action arising elsewhere* (Simon *vs.* Southern Railway Company, 236 U. S., 115; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8).

The plaintiff accordingly assumes an untenable position when he argues that the Federal District Court sitting in Louisiana has jurisdiction of a defendant foreign

corporation served through its statutory agent even though the Louisiana rule restricts actions against the foreign corporation through service upon that agent to suits upon causes of action arising out of business done by that corporation within the State, and even though this particular cause of action does not arise out of any business done by the foreign corporation within the State. In such a situation, the plaintiff, in an effort to bring the defendant into court, *uses the statutory agent;* and then, *having thus taken the benefit of the State statutes* and used the statutory agent, *inconsistently argues that that agent has greater powers than the State statute gives him* (Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93). The two positions are clearly incompatible. *Plaintiff seeks the benefits of an agency which the State law has created, and at the same time he repudiates the limitations upon this agency established by this same State law.*

The Circuit Court of Appeals appeared to entertain the view that the District Court had jurisdiction of the suit as against the Southern, because the Southern was doing some business in Louisiana and because service was made there upon one of its agents; and that accordingly the fact that this agent was the designated statutory agent for service of process and the State rule as to the extent of the implication of consent to be sued resulting from such a designation, were not material upon the jurisdictional question (R., 426). Jurisdiction in the present case cannot be maintained upon this theory, since the implication of consent to be sued resulting from the doing of business in a State by a foreign corporation, unless there be a compliance with the State requirement for the

designation of a statutory agent, is always *restricted to actions arising out of business done by the foreign corporation in that State.* (Simon *vs.* Southern Railway Company, 236 U. S., 115; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8). It is *impossible to sever* the jurisdictional issue in this case from the issue of the extent of the implication of consent to be sued resulting from the designation by the Southern of a statutory agent for service of process in Louisiana.

The rulings of the District Court and the Circuit Court of Appeals on this issue *conflict directly with the ruling of this Court in the recent case* of Mitchell Furniture Company *vs.* Seldon-Breck Construction Company, 257 U. S., 213, an action filed in an Ohio State Court by an Ohio corporation, for damages for the breach of a contract made outside Ohio and to be performed outside Ohio. The defendant was a foreign corporation which had done business in Ohio, and which had qualified in that State by designating an agent for service of process pursuant to the State statutes. *Service was made upon this designated agent.* This defendant removed the suit to the appropriate Ohio Federal District Court, which held that this service did not give the court jurisdiction over the defendant. That court then dismissed the suit for want of jurisdiction, upon the plaintiff's statement that it could not secure service otherwise (257 U. S., 214). As this analysis shows, while the suit originated in a State court, *it was removed to a Federal court and the jurisdictional question passed upon by the latter court involved its own jurisdiction,* and not merely the jurisdiction of the State court.

Upon appeal, this Court affirmed the judgment, saying (p. 215):

> *"The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the* State. Of course when a foreign corporation appoints one as required by statutes *it takes the risk* of the construction that will be put upon the statute and the scope of the agency by the State court. Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case the implication is limited to business transacted within the State. Simon *vs.* Southern Ry Co., 236 U. S., 115, 131, 132. Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8, 22, 23. *Unless the State law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere,* at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. Chipman, Ltd., *vs.* Thomas B. Jeffery Co., 251 U. S., 373. *The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this State.' Gen. Code* § 181. *As we know of no decision to the contrary by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad."*

This is a recent and direct ruling by this Court that the jurisdiction of a Federal district court over a foreign corporation, cited through service upon its agent designated for service of process under State statutory pro-

visions, *depends upon these State statutes and the interpretation thereof*. The decisions of the District Court and of the Circuit Court of Appeals are *directly in conflict with this recent ruling of this Court.*

Our case is even stronger than is the case just cited. In that case, the court ruled that a Federal district court has no jurisdiction in a suit against a foreign corporation arising out of business done outside the State, through service upon a statutory agent, *unless the State law "either expressly or by local construction"* (257 U. S., 216) *has extended the jurisdiction* acquired through service upon such an agent to suits arising out of business transacted outside the state. In the present case, on the other hand, the Louisiana jurisprudence, to which we will refer, *specifically restricts jurisdiction* over a foreign corporation with a designated agent for service of process, to suits arising out of business done within the State.

In this connection, see also Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, where this Court said (p. 535):

> "Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction where*

possible, that would exclude from their operation causes of action not arising in the business done by them in the State." Mitchell Furniture Co. *v.* Selden Breck Construction Co., *ante*, 213; Old Wayne Mutual Life Association *v.* McDonough, 204 U. S. 8, 22; Simon *v.* Southern Ry. Co., 236 U. S. 115, 130.

Although *we cited and stressed these two recent and clearly pertinent rulings of this Court*, both in the District Court and in the Circuit Court of Appeals, *neither of these cases are mentioned*, either in the opinion of the District Court (R., 17-22), or in the opinion of the Circuit Court of Appeals (R., 424-6) herein. The *failure of either of the courts below to mention*, or to endeavor to distinguish or differentiate them is significant.

The rulings below also conflict with the ruling in Maxwell *vs.* Atchison Railroad Company, 34 Fed. (C. C. E. D. Mich.), 286—an opinion by Judge Brown, who shortly thereafter was appointed a Justice of this Court. That case, upon the jurisdictional issue, is *strikingly similar to the present case* as to the facts (34 Fed. 286-7), as to the situs of the origin of the cause of action (34 Fed., 287), and as to the rule of State law, limiting suits against foreign corporations to causes of action arising within the State (34 Fed., 287). In this situation, Judge Brown maintained a plea to jurisdiction, treating the rule of State law as applicable to the jurisdiction of a Federal court over such a case (34 Fed., 289).

In addition to the Barrow Steamship Company case (the *only authority* relied on by the Court of Appeals in support of its ruling on this point), the district judge also cited a number of other cases (R., 17-22). None of these

other decisions pass directly upon the point here at issue, and *none of them are as strong an authority for the position of the plaintiff on this point as is the Barrow Steamship Company case.*

Two of these cases pass upon the jurisdictional question as to suits in a State court, and not as to suits in a Federal Court (St. Clair *vs.* Cox, 106 U. S., 350, and Connecticut Mutual Life Insurance Company *vs.* Spratley, 172 U. S. 602). In the first case, the State judgment was held not enforcible under the full faith and credit clause, because of a lack of any proof that the defendant foreign corporation was doing business in the State. In the second case, jurisdiction was maintained upon the finding that the foreign corporation was doing business in the State. In the latter case, the suit arose out of business done in the State and the foreign corporation had actually designated an agent for service of process there. Neither of these rulings touch the issue here presented.

In Mexican Central Railway Company *vs.* Pinkney, 149 U. S. 194, this Court held that a State statute giving to a special appearance by a plea to the jurisdiction the effect of a general appearance, is inapplicable to proceedings in the Federal courts. As was there said, it is manifestly beyond the power of a State legislature to deprive a person of the right guaranteed to him by the Federal statutes to have the jurisdictional question preserved for review on appeal in Federal court litigation.

All that is held in Munster *vs.* Weil Corset Company, 261 U. S., 276, and Mechanical Ap. Co. *vs.* Castleman, 215 U. S. 437, is that when a defendant attacks the validity of the service of process, after removing the case to the Federal court, the procedure whereby this attack is made is

governed by the general principles of Federal law, and not by the State rule of practice.

In Walsh *vs.* Atlantic Coast Line Railroad Company, 256 Fed. (D. C. Mass.) 47, it was held that a foreign railroad corporation found to be doing business in Massachusetts, but having no designated agent for the service of process there, is subject to suit in that court on a cause of action arising in Florida. This ruling is clearly at variance with the decisions of this Court in Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8, and Simon *vs.* Southern Railway Co., 236 U. S., 115, to the effect that even if a foreign corporation is doing business in the State, its liability to suit there is necessarily restricted to causes of action there arising, if it has not designated an agent for service of process.

In Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, the plea to the jurisdiction was maintained upon the familiar ground that the corporation was doing no business in the State and the officer served with process had come into the State for some other object than the transaction of corporate business. The same principle controlled the decision in Goldey *vs.* Morning News, 156 U. S., 518, wherein this Court refused to follow certain State decisions which upheld jurisdiction in a case of that character. Since these State rulings are clearly violative of the "due process" clause, it is easy to understand why this Court declined to follow them.

Upon the foregoing, we respectfully submit that the holdings of the District Court and the Circuit Court of Appeals upon this phase of the jurisdictional issue are *erroneous and in conflict with the decisions of this Court*

and the other Federal jurisprudence upon this question of law. As we have already indicated, the ruling against us below, on the jurisdictional issue, rested primarily upon the phase of that issue discussed in this section of our brief.

POINT No. 1 B.

Plea to Jurisdiction.

Foreign Corporation with Designated Agent for Service of Process not Suable in Louisiana Courts on Cause of Action not Arising Out of Business Done by It in That State.

The District Judge (R., 17) *conceded the correctness of our contention* that a foreign corporation designating an agent for service of process in Louisiana, becomes thereby suable in the State courts, under the State law, *only upon causes of action arising out of its business within that State*, and not upon causes of action arising out of its business elsewhere. The Circuit Court of Appeals *indicated a view to the contrary, but found it unnecessary to pass upon this point directly* (R., 424-5). The Circuit Court of Appeals made no reference to and apparently overlooked the *recent decision of this Court sustaining our contention* as to the Louisiana rule on this point (Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533, quoted *infra*).

This Court has definitely settled the rule to be that (1) when the foreign corporation is doing business in a State *without complying with statutory requirements for the designation of an agent* for service of process the jurisdiction of the courts of that State, as to suits against that

corporation, is *necessarily limited to causes of action arising out of business done in that State*, and cannot constitutionally extend to causes of action arising out of business done elsewhere (Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Railway Company, 236 U. S., 115), and (2) when the foreign corporation has *designated an agent for service of process* pursuant to State statutory requirements, *it is for the State to determine*, either by a specific statute or by judicial interpretation, whether the foreign corporation is suable there only upon causes of action arising out of business done within that State, or whether the foreign corporation is suable there upon all transitory causes of action, however and wherever arising (Pennsylvania Fire Insurance Company *vs.* Gold Issue Mining & Milling Company, 243 U. S. 93).

This Court has very clearly recognized, in the recent case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, that *Louisiana has limited suits* in its courts against a foreign corporation with statutory agent, *to causes of action arising out of business done within the State*. The Louisiana decisions affirmed by this Court in that case are not reported, but the progress of that litigation through the State courts is thus described by this Court in the following language (p. 534):

> "Act 243 of 1912, p. 543, and Act 267 of 1914, p. 532, of the Annual Laws of Louisiana, provide that service on foreign corporations may be made on any agent which the corporation has designated, and require that every foreign corporation doing business in the State shall file a written declaration with the Secretary of State, showing its domicile and the place or places where it is to do business and designating its agent, resident in the parish

where its business is to be done, and that service on said agent, whether personal or domiciliary, shall be a valid service on it. *The Court of Appeals in this case held, following what it deemed to be the holding by the Louisiana Supreme Court in the case of Watkins vs. North American Land & Timber Co., 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309, that the Louisiana statute was not intended to give the State courts jurisdiction over foreign corporations by service on agents appointed thereunder, in transitory actions arising in another State. The action of the Supreme Court in refusing to entertain an appeal in this cause shows this to be the authoritative construction of the statute by the State courts.*"

In affirming the judgment, and in approving the rule of State law thus outlined, this Court further said (p. 535):

"Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.* Robert Mitchell Furniture Co. *vs.* Selden Breck Construction Co. (opinion handed down December 5, 1921), 257 U. S. 213, 42 S. Ct.

84, 66 L. Ed. 201; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345; Simon *vs.* Southern Railway, 236 U. S. 115, 130, 35 Sup. Ct. 255, 59 L. Ed. 492. The latter case was a Louisiana case under this same law."

More recent rulings to the same effect by the Louisiana courts are found in Delatour & Marmouget *vs.* Southern Railway Company, 4 La. Ap. 658, and Buscher *vs.* Southern Railway Company, 4 La. Ap. 653. These are companion suits (1) by the owners of four race-horses and (2) by the caretaker who accompanied these race-horses, for damages alleged to have been sustained in a railroad accident at Greenville, S. C., while the freight car containing the race-horses and the caretaker was in the custody of the Southern. This car was then moving from Washington to New Orleans over the *identical railroad lines* which carried the plaintiff in the present case from New Orleans to Washington. The cases just cited accordingly resemble the present case, in so far as the Southern is concerned, in that in each of these cases the movement over the lines of the Southern was between Atlanta, Ga., and Washington, D. C.—*entirely outside the State of Louisiana.* A further point of resemblance is that in each of these cases *the accident in question occurred at a point outside the State of Louisiana*, during the movement over the lines of the Southern between the points above named.

In the two cases cited, the Louisiana Court of Appeals for the Parish of Orleans maintained pleas to the jurisdiction filed by the Southern, based upon the *same contention* as is urged by that litigant here. As the report of these cases shows, *the Louisiana Supreme Court approved the ruling* by denying applications for writs of review.

The holding of the Court of Appeals for the Parish of Orleans in these cases (thus approved by the Louisiana Supreme Court) is stated in the syllabus (by the Court) in the two cases (4 La. App.. 653, 658). The wording of this syllabus (identical in both cases) is as follows:

> "In a transitory action *arising in another State*, the courts of this State, irrespective of the citizenship of the plaintiff, are *without jurisdiction to entertain a suit brought against a foreign corporation* doing no local business within this State. Under such conditions, a plea taken to the jurisdiction is well-founded, despite the fact that the defendant corporation, under the laws of this State, has *voluntarily designated an agent to represent it within this State*, as one upon whom citation may be served."

And in the body of the opinion in the Delatour & Marmouget case, the Court said, referring to the decision of this Court which we have cited *supra* (p. 661):

> "It is our opinion, that the question is no longer open to discussion, *in the light of what has been determined by the United States Supreme Court* in the case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S. 533."

This question is discussed in an earlier Louisiana decision, State *ex rel.* Watkins *vs.* North American Land & Timber Company, 106 La. 621, 31 Sou. 172, a mandamus proceeding involving the asserted right of a stockholder in an English corporation, qualified to do business and having an office in Louisiana, to inspect the corporate books and records of the Louisiana office. In that case the Louisiana Supreme Court referred to the jurisprudence

in *some other States* which permits a foreign corporation, with a designated agent for service of process, to be sued in such States upon all transitory causes of action, however or wherever arising, and it then said (p. 630):

> *"It is not necessary, nor would we be disposed, to adopt the extreme view last above referred to.* On the contrary, we might hold that the jurisdiction acquired by service of process on respondent's agent in this State is confined to cases in which the cause of action arises here, and nevertheless maintain the jurisdiction so acquired in the instant case. For, whilst the relator's right, if he has any, to inspect the respondent's books, may spring from the contract made in England, the cause of action disclosed in his petition consists of the refusal of the respondent's agent here to permit him to exercise that right."

A similar reference to the different and more liberal rule prevailing in *some other States* on this point will be found in the opinion in Williams *et al. vs.* Pope Manufacturing Co., 52 La. An. 1417, 27 Sou. 851, but that case actually involved a suit by residents of Mississippi against a foreign corporation doing business in New Orleans, for *an alleged tort committed in New Orleans* (libel, slander, public defamation, malicious prosecution and false imprisonment), and the question here involved was not there presented for decision.

It is clear from the foregoing that neither in the Watkins case nor in the Williams case was there any direct ruling adverse to our contention upon the point now at issue. Furthermore, the *later Louisiana jurisprudence* (which we have reviewed, which is directly in our favor,

and which has received the *specific approval of this Court*) clearly predominates over any dicta to the contrary which may be found in the two earlier cases.

When the decisions which we have cited were rendered, the Louisiana statute then in force on the subject of the designation of an agent for service of process by a foreign corporation was Act 243 of 1912, which reads as follows:

> "That it shall be the duty of every foreign corporation other than foreign insurance companies doing business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, the place of its principal business establishment, and the name of its agent or agents or other officer in this State upon whom process may be served, provided, that no foreign corporation shall select as its agent or agents for service any person not residing in a parish where said corporation has an established business and, provided further that *service on said agent whether personal or domiciliary shall constitute a valid service on said foreign corporation.* Provided that every foreign insurance company doing business in this State shall appoint the Secretary of State its agent upon whom all legal processes shall be served, and such service shall be legal and valid, as against such foreign insurance company."

Since the rendition of these decisions, but prior to the institution of the present suit, the Louisiana Legislature enacted on this subject Act 184 of 1924, which contains the following pertinent provisions:

"Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of said corporation consenting and agreeing on the part of the said corporation that *any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation* and that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation *growing out of or connected with the business done by said corporation in this State.*"

The latter portion of the above quotation from this new statute clearly indicates that the primary aim of the legislature was to subject the foreign corporation to suit in the State on *causes of action arising out of business done by it within the State.*

The Circuit Court of Appeals, in its opinion herein, suggests (R., 424-5) that the clause *"any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation"* has changed the State law upon the point under consideration, and that the specific decisions which we cite in our favor on this issue no longer represent the State law. The new statute in question has never been construed by any Louisiana court, and the clause stressed by the Circuit Court of Appeals, as quoted above, does not differ materially in its wording from the corresponding clause in the earlier statute, that *"service on said agent whether personal or domiciliary shall constitute a valid service upon said corporation."*

The *real new legislation* in Act 184 of 1924 is the added proviso *continuing the agency* for service of process as to all liabilities arising from operations in the State of a corporation that has left the State. The evident purpose of this enactment was to remedy this omission in the earlier statutes on the subject. See Gouner *vs.* Missouri Valley Bridge & Iron Co., 123 La. 964, 49 Sou. 657.

As we pointed out, there is *no substantial difference* in the wording of the two stattutes *quoad* the provision that process served on the designated agent is a valid service on the corporation. In this situation, *the construction of the earlier statute*, which sustains our contention, *applies also to the later statute*. To this effect, see the following authorities:

Stewart *vs.* Kahn, 11 Wall., 493 (p. 502):

> "A change of language in a revised statute will not change the law from what it was before, *unless it be apparent that such was the intention of the legislature.*"

Anderson *vs.* Pacific Coast S. S. Co., 225 U. S., 187 (p. 199):

> "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect *unless such intention is clearly expressed.* United States *v.* Ryder, 110 U. S. 729, 740; United States *v.* LeBris, 121 U. S. 278, 280; Logan *v.* United States, 144 U. S. 263, 302; United States *v.* Mason, 218 U. S. 517, 525."

25 R. C. L., 1050:

> "In the case of a general revision or codification of statutes it is well settled that a mere change of phraseology or the omission or addition of words will not necessarily change the operation or construction of former statutes,

> for the new language may be attributed to a desire to condense and simplify the law. *The language of the statute as revised or the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation.*"

The point here involved is a question of State statutory construction. There are no State decisions construing the new statute. The suggestion of the Circuit Court of Appeals that the new statute has changed the State law in this respect (based upon an *unsubstantial variance* in the pertinent language of the two statutes in question), is in *direct conflict* with the rule for the interpretation of statutory provisions of this particular character, *stated by this Court in the two recent decisions* upon which we rely:

> Mitchell Furniture Company *vs.* Selden-Breck Construction Company, 257 U. S., 213 (p. 216):
>
> > "Unless the State law either expressly or by local construction gives to the appointment a larger scope, *we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere.* . . ."
>
> Missouri-Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533 (p. 535):
>
> > ". . . in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, *this Court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.*"

Upon the foregoing, we submit that the law is clearly with us upon this phase of the case, and that the suggestion of the Circuit Court of Appeals to the contrary is: (1) clearly erroneous, and (2) in *direct conflict with the pertinent principles enunciated in the decisions of this Court on the subject.*

POINT NO. 1 C.

Plea to Jurisdiction.

Present Suit Does Not Arise Out of Any Business Done by Southern in Louisiana.

The District Judge resolved this question *against us* (R., 17-8). The Circuit Court of Appeals *did not find it necessary to decide* this point.

The plaintiff bought his ticket in New Orleans from the L. & N. (R., 113-4). The train which carried him out of New Orleans and beyond the boundaries of Louisiana, was operated by the L. & N. over its own tracks (R., 207-8). From New Orleans to Atlanta, this train was operated by the L. & N. and other railroad corporations, all entirely independent of the Southern (R., 85). *All that the Southern did, as to the plaintiff, was to receive him as a passenger at Atlanta and to transport him from there to Washington, a movement entirely outside the boundaries of Louisiana. The accident occurred in the course of this transportation while the train was at some point in the State of Virginia* (R., 2, 152, 163-4).

The record shows that the *plaintiff's dealings in New Orleans* as to the trip in question were *entirely with the L. & N.* (R., 113-4), from which he purchased his ticket.

There is no showing in the record that he had any dealings in New Orleans as to the trip in question either with the Southern soliciting office there, or with the offices of the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company there. In fact, these lines operate a competing route to Washington from New Orleans.

On this phase of the case, we are accordingly not concerned with the fact that the Southern owns almost all of the stock in the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company (R., 80), which own and operate railroad properties in Louisiana (R., 68-70) but which *function as separate corporations* (R., 69-70). *This stock ownership does not make the acts of these other corporations the acts of the Southern* (Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S., 364). Nor are we concerned with the testimony as to the passenger and freight soliciting offices maintained in New Orleans by the Southern Railway System, which solicit freight and passenger business for the lines of the Southern itself, lying entirely outside the State of Louisiana (R., 70). Our plea to the jurisdiction is not based upon the allegation that the Southern does no business whatsoever in Louisiana, but rather upon the assertion that whatever business it may or may not do there in other connections, *the present suit does not arise out of any business done by it in that State*.

The argument that this suit as to the Southern exhibits a cause of action arising out of business done by that corporation in Louisiana rests upon the following elements:

(*a*) The purchase by plaintiff from the L. & N. in New Orleans of a through ticket entitling him to transportation from New Orleans to Washington and specifying travel over the lines of the Southern for that part of this journey between Atlanta and Washington.

(*b*) The transportation of plaintiff from New Orleans to Washington in a through train known as the Piedmont Limited, operated by the various other railroad corporations previously named, over their respective lines, and by the Southern over its lines, from Atlanta to Washington.

(*c*) The use in this through train of a car belonging to the Southern, and the fact that plaintiff rode in this car from New Orleans to Washington, the movement from New Orleans to Atlanta being over lines other than the Southern.

Under the jurisprudence of this Court, none of the above facts constitute the doing of business in a legal sense by the Southern in Louisiana. It follows from this that (whatever business the Southern may or may not do in Louisiana as to other matters) the present suit, *quoad* it, does not arise out of any business done by it within that State. The ruling of the District Judge in the present case to the contrary on this point is clearly at variance with the applicable jurisprudence of this Court.

These elements were *all involved* in the case of Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S. 364. In that case two railroad corporations (one called the Pacific Company and the other called the Gulf Company in the opinion) operated a *continuous railroad line* through Texas and other States. The Gulf Company owned and operated this line in Texas to the Texas border. The Pacific Company

owned and operated a line from that point northward. The suit in question was an action for damages for the alleged killing of an engineer in the employ of the Pacific Company in Indian Territory. The action was filed in a Texas Federal court. Jurisdiction was sought to be maintained as to the Pacific Company upon the theory that, because of its relationship with the Gulf Company, it was doing business in Texas *through the agency of the Gulf Company.*

It was shown that the Gulf Company sold tickets in Texas, good for a through trip over its own lines to the Texas border and over the lines of the Pacific Company beyond. It was further shown that the two railroads operated through trains, without any change of cars at the point where their lines joined at the Texas border. It was even shown that the same employees handled these trains on both sides of this point of joinder, being paid by the Gulf Company for the time which they worked on the Texas side of this point and being paid by the Pacific Company for the time which they worked on the other side of this point. It was also shown that the Pacific Company owned a controlling stock interest in the Gulf Company.

This Court held that this stock ownership did not make the Gulf Company the agent of the Pacific Company, saying (p. 391):

> "It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave

> the Pacific Company the power to control the road by the election of directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; *but this power does not make it the company transacting the local business.*"

This Court further held that the sale of through tickets by the Gulf Company, entitling the purchasers to transportation over the lines of the Pacific Company lying outside of Texas, did not constitute a doing of business in Texas by the Pacific Company. To this effect it said (p. 394):

> "The conductors, one of whom was served, when he crossed the Texas line, this record shows, *became the servant and agent of the Gulf Company.* The ticket agent sold tickets for the Gulf Company, in whose employment he was. He would also sell tickets good upon its line, and over the lines of the Pacific Company, but *he transacted this business as the agent of the Gulf Company.*"

For these and other reasons fully stated in the opinion, this Court held that the recited facts as to the relationship between the Pacific Company and the Gulf Company did not constitute a doing of any business in Texas by the Pacific Company, through the Gulf Company, so as to make the former subject to suit in that State. The judgment maintaining the plea to the jurisdiction was accordingly affirmed.

The present suit is not nearly so strong on the facts for the plaintiff as was the cited case. In the present case the L. & N., the seller of the ticket and the initial carrier, is an *independent corporation*, not a subsidiary of

the Southern and forming *no part of the Southern Railway System* (R., 85, 208). In the present case the Southern did not receive the plaintiff as a passenger until the train reached Atlanta, *several hundred miles from the Louisiana border* (R., 2). The lines of the Southern and of the L. & N. on this trip do not even directly connect, and there is an *intervening intermediate carrier* from Montgomery to Atlanta, the A. & W. P. (R., 208), which is neither owned nor controlled by the Southern (R., 85).

Another decision of this Court supporting our position in the case is Philadelphia & Reading Co. *vs.* McKibben, 243 U. S., 264. That case exhibits an effort to sue the Philadelphia & Reading Company in New York, although it was a Pennsylvania corporation operating and owning railroad lines in Pennsylvania and New Jersey, and not in New York. The suit arose out of a New Jersey accident.

One basis for the contention that the Philadelphia & Reading Company was doing business in New York was the fact that the Central Railroad Company of New Jersey sold through tickets in New York, good for transportation over its own lines in that State and over the lines of the Philadelphia & Reading Company in other States. The facts in this connection are fully stated in the opinion of the court. In holding that these facts do not amount to doing business in New York by the Philadelphia & Reading Company, this Court said (p. 268):

> "The finding that the defendant was doing business within the State of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. *Obviously the sale by a local carrier*

of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every State."

Another case in point here is General Investment Co. *vs.* Lake Shore & M. S. R. R. Co. *et al.*, 256 Fed. (6th C. C. A.), 160; affirmed 260 U. S., 261. In that case, the ruling was that the New York Central Railroad Company was not doing business in Ohio and was not subject to suit there.

This railroad admittedly did not own or operate any property in Ohio itself, but the contention was that it was doing business there through its connecting lines, the plaintiff there invoking the elements (involved in this case also) of the sale of through tickets and the operation of through trains and through cars. The facts in this respect are fully set forth in the opinion of the Circuit Court of Appeals in the cited case (250 Fed., 165-6). That Court ruled against the plaintiff, following the decisions of this Court which we have just cited and saying (250 Fed., 166-7):

> "The doctrine of this case was recently reaffirmed and emphasized in Philadelphia Railway *v.* McKibbin, 243 U. S., *supra*, at page 268, 37 Sup. Ct., 280, 61 L. Ed., 710, in which it was held that *the sale by a local carrier within a State of through tickets over the line of a foreign connecting carrier did not involve a doing of business within the State by such connecting carrier*, otherwise, 'nearly every carrier in the country would be "doing business" in every State'; and that even if the defendants' 'subsidiary companies' did business within the State, this would not, under the authority of the Peterson case, warrant a finding that it did business there."

In affirming this judgment, this Court specifically rested its ruling upon the reasons assigned by the Circuit Court of Appeals, as to this phase of the case. (See 260 U. S., 268.)

Other cases sustained our contention upon this issue are as follows:

Cancelmo *vs.* Seaboard Air Line Ry., 12 Fed. (2) (Ct. Ap. D. C.), 166.
Allen *vs.* Yellowstone Park Transportation Co., 154 Fed. (C. C. E. D. Mo.), 504.
Maxwell vs. Atchison R. R. Co., 34 Fed. (C. C. E. D. Mich.), 286.

In contending that the present suit *quoad* the Southern arises out of business done by that corporation in Louisiana, the plaintiff's main argument has been that, when he purchased a through ticket from the L. & N., in New Orleans, entitling him to transportation over the line of the Southern from Atlanta to Washington, this transaction amounted to a doing of business in Louisiana by the Southern through the L. & N. as its *agent*. The decisions of this Court which we have already reviewed are sufficient to dispose of this argument. This contention is also *at variance with the ruling of this Court* in the recent case of Bank of America *vs.* Whitney Central National Bank, 261 U. S., 171, wherein it was contended that the Whitney Central National Bank (of New Orleans) was doing business in New York and subject to suit there because its business relationship with various New York banks constituted the latter as *agents* of the Whitney Bank in certain New York transactions. In affirming a judgment of dismissal for want of jurisdiction, this Court said (p. 173):

> "Its regular New York business was transacted for it by its correspondent—the six independent New York banks. *They, not the Whitney Central, were doing its business in New York.*"

Upon the foregoing, we respectfully submit that whatever other business the Southern may or may not do in Louisiana *the plaintiff's cause of action, as against the Southern, cannot be said to arise out of any business done by that corporation in Louisiana.* The plaintiff's cause of action, as against the Southern, rests entirely upon the facts (1) *that it transported him as a passenger from Atlanta to Washington, and* (2) *that an accident occurred in the course of this transportation at some point in Virginia.* In this situation, it is clear that, *quoad* the Southern, the plaintiff's cause of action arises out of business done by that corporation outside of Louisiana, and not out of any business done by that corporation within Louisiana. The decisions of this Court cited above clearly sustain this position, and it is obvious that the district judge and the Circuit Court of Appeals erred in not so holding.

Point No. 1 D.

Plea to Jurisdiction.

Rendition of Judgment by Court Without Jurisdiction Violative of Due Process Clause.

The constitutional issue of "*due process of law*" (R., 49) is involved in the jurisdictional question in this case. It is fundamental that *jurisdiction* in the court rendering the judgment is one of the *essentials of "due process."*

This has been recognized in the leading case of Pennoyer *vs.* Neff, 95 U. S., 714, wherein this Court said (p. 733):

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that *proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.*"

While the language above quoted refers to "due process" in State court proceedings, this language is equally applicable to "due process" in Federal court proceedings, since the Fifth Amendment thus regulated Federal action long before the Fourteenth Amendment thus regulated State action.

The same principle is also stated in Twining *vs.* N. J., 211 U. S., 78, wherein this Court said (p. 110):

> *"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction."* Pennoyer *v.* Neff, 95 U. S., 714, 733; Scott *v.* McNeal, 154 U. S., 34; Old Wayne Life Association *v.* McDonough, 204 U. S., 8."

To the same effect, see also Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8 (a case frequently cited in our argument on the jurisdictional question) wherein this Court thus described the contention which it there sustained (p. 15):

> "The plaintiff in error insists that the Pennsylvania court had no jurisdiction to proceed against

> it; consequently, the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment."

If this Court sustains our contention that the Southern is not subject to suit in a Louisiana Federal District Court through service upon the agent for service of process which it has designated in that State, the case will then come within the principle thus stated by this Court in Simon *vs.* Southern Railway Co., 236 U. S., 115 (p. 132):

> "From the principle announced in that case it follows that service under the Louisiana statute would not be effective to give the District Court of Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was *not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama.*"

Upon the foregoing, we respectfully submit that if the plea to the jurisdiction be in fact good, the present proceedings in so far as the Southern is concerned, exhibit a lack of one of the essentials of "due process." This shows that the jurisdictional issue involved herein is not an ordinary question of law, but involves the denial of a fundamental constitutional right.

POINT NO. 2

Erroneous Admission of Plaintiff's Testimony as to Statements by Physicians Concerning His Eyes and Erroneous Classification of This Ruling by Circuit Court of Appeals as "Not Prejudicial Error" upon Specu-

lative Inference That Jury Was Not Influenced at All by This Testimony.

Upon the trial the plaintiff, on the issue of his alleged injuries, was permitted to testify to *statements assertedly made to him by two physicians* as to the condition of his eyes several weeks after the accident. The district judge overruled objections by defendants to the admission of this clearly hearsay testimony (Bill No. 5, R., 385-7; R., 116-7). The Circuit Court of Appeals, without specifically approving or disapproving this ruling, classified it as "*not prejudicial error*," upon the *speculative inference* that this testimony had no weight whatsoever with the jury (R., 429-30).

The admission of this hearsay testimony was *clearly erroneous*, under the fundamental principles of the law of evidence. The *speculative assumption* by the Circuit Court of Appeals that the error committed, if any, was harmless, is *in conflict with the decisions of this Court* to the effect that errors of this character can be classified as harmless *only when the court can say positively and beyond doubt* that the verdict of the jury could not have been affected or influenced to any extent by the testimony erroneously admitted.

The opinion of the Circuit Court of Appeals *does not fully reproduce* the evidence admitted over this objection. This evidence, as it appears in the record, was as follows (R., 116-7, 386):

> "*I went to see Dr. Bloom twice and they told me my eye was getting very bad. I went to see Dr. Rudolph Matas * * * Dr. Matas stated I was suffering with traumatic conjunctivitis.*"

Dr. Bloom is an *eye specialist* (R., 116). Dr. Matas is probably the *leading New Orleans physician*, and a man of national reputation. *Neither of these physicians testified in the case*, and there was no showing of any unsuccessful attempts by the plaintiff to procure their evidence.

The opinion of the Circuit Court of Appeals mentions only plaintiff's quotation of Dr. Matas. It does not mention plaintiff's quotation of Dr. Bloom, although the objections to both of these items of testimony are covered by the same bill (Bill No. 5, R., 385-7), and the same assignment (R., 53-4).

Under the *elementary principles* of the law of hearsay, the objections which we interposed to all of this testimony were *clearly good*, and the district judge clearly erred in overruling these objections.

In Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S. 99 (a personal injury suit), this Court held that a physician who had previously examined the plaintiff, and who testifies as a witness, may refer to a written statement of his findings made at the time of his examination, for the purpose of refreshing his memory, but that *the witness should not be permitted to read this statement to the jury* as a part of his testimony, although he identifies it as a correct statement prepared by him. This Court in that case said (p. 103):

> "The practice of admitting in evidence the *unsworn statements of witnesses, prepared, in* advance of trial, at the request of one party, and without the knowledge of the other party, *should not be encouraged by further departures from the established rules of evidence.*"

The evidence there held inadmissible was certainly much more authentic than the hearsay evidence admitted over our objection in the present case. In the cited case, the physician who was the author of this written statement, testified under oath to its correctness.

The principle that makes this testimony inadmissible was recognized by our Circuit Court of Appeals itself, in its recent ruling in V. S. & P. Railway Company *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, a personal injury suit. The plaintiff there introduced in evidence his original army discharge (a much more authentic form of proof than verbal repetition by a patient of verbal statements of physicians) for the purpose of showing that he had been an able-bodied man at the time the document was issued. In holding that this document should have been excluded, the Circuit Court of Appeals said (p. 115):

> "It was clearly not admissible for that purpose, as it was *an ex parte document, and could not have been binding upon defendant without an opportunity to cross-examine its maker.*"

The admission of testimony by a plaintiff in a damage suit for personal injuries, as to statements made to him concerning his injuries by physicians, is quite generally recognized as an erroneous violation of the rule against hearsay evidence. To this effect, see Louisville & Nashville Railroad Company *vs.* Lynch, 126 S. W., 362; 137 Ky., 696, wherein the court said:

> *"It was violative of one of the fundamental principles or rules governing the introduction of evidence to permit plaintiff to testify as to what his doctors had told him."*

To the same effect see, also, the following decisions:

Texas Power & Light Co. *vs.* Burger, 166 S. W. (Tex.), 680.

Trott *vs.* C. R. I. & P. Ry. Co., 86 N. W., 33; 115 Iowa, 80.

Johnson *vs.* Powell, 123 Pac., 881; 87 Kan. 142.

Louisville & Nashville R. R. Co. *vs.* Smith, 84 S. W., 755; 27 Ky. L. R., 257.

Zipus *vs.* United Railways & Electric Co., 108 Atl. (Md.), 884.

M. K. & T. Ry. Co. *vs.* Creswell, 78 S. W., 388; 34 Tex. Civ. Ap., 278.

The foregoing is sufficient to demonstrate that the admission of this testimony by the district judge clearly *violated the fundmental and elementary principles* of the law of evidence. The ruling admitting such testimony *conflicts* with the jurisprudence of this Court, with the prior jurisprudence of the Fifth Circuit Court of Appeals, and with the general jurisprudence on the subject.

The Circuit Court of Appeals did not specifically approve this ruling of the district judge. It merely classified the point as *"not prejudicial error."* In speaking of the remark attributed by the plaintiff to Dr. Matas, it says (R., 430):

> "As the jury had before them the testimony of several physicians who were witnesses for the plaintiff, and the testimony of several other physicians who were witnesses for the defendant—*the testimony of the former tending to prove that the trouble in plaintiff's eye was due to small pieces of glass or other foreign substances getting into it, and*

> ***the testimony of the latter tending to prove that trouble was not due to any foreign substance getting into the eye,—it seems quite reasonable to infer that the jury's conclusion as to the cause of the plaintiff's eye trouble was based on a consideration of the testimony of physicians given in the presence of the jury, and to no extent upon the above-mentioned statement of plaintiff as to what Dr. Matas said,*** especially as there was an absence of any evidence that Dr. Matas made an examination of plaintiff's eye, nothing in plaintiff's own testimony being inconsistent with the conclusion that the deposed-to statement of Dr. Matas as to the condition of plaintiff's eye was based solely on what plaintiff said to him as to the cause of the trouble. We are of opinion that there is no reasonable ground for believing that the result of the trial was affected to any extent by the statement of the plaintiff which is under consideration, and that the admission in evidence of that statement was *not prejudicial error.*"

The jurisprudence of this Court on the classification of error in the admission of testimony as "not prejudicial error" requires specifically that the Court so ruling must reach the conclusion that it is "*so clear as to be beyond doubt*" that the error did not and could not have prejudiced the party's rights to any extent (5 Wall., 808). The Circuit Court of Appeals, even in its incomplete analysis of the testimony erroneously admitted, *does not announce any such conclusion.* It simply states (R., 429-30) that the evidence of the physicians who did testify was *sharply conflicting* upon the issue of plaintiff's alleged injuries, and *it thereupon speculatively assumes* that the jury finding in favor of plaintiff upon the issue of eye injury was based

one hundred per cent upon the testimony properly admitted and tending to sustain such a finding, and *nil* upon the testimony improperly admitted and tending to sustain such a finding.

It is indeed a novel doctrine that in such a situation an appellate court can classify an obvious error in the admission of testimony as "not prejudicial" by such *speculative inference*. The conceded fact that the properly admitted testimony was *sharply conflicting* on the issue in question rather indicates that the testimony improperly admitted on this issue *may probably have been a material factor* in swaying the jury to its finding for the plaintiff.

If the holding of the Circuit Court of Appeals upon this issue were good law, *practically all errors* in the admission of evidence *could be classified as harmless and non-prejudicial*, by this method of speculative inference. In practically every case in which evidence upon an issue is erroneously admitted, the record also contains some properly admitted testimony tending to support the position on that issue of the party tendering the evidence improperly admitted.

We will now demonstrate that this ruling of the Circuit Court of Appeals, classifying a plain error in the admission of testimony as "not prejudicial error," upon the basis of what are necessarily nothing more than *speculative inferences*, is clearly at variance with the pertinent jurisprudence of this Court.

The early leading decision by this Court upon the classification of error by an appellate court as "not prejudicial error" is Deery *vs.* Cray, 5 Wall., 795. This Court

there said, in declining to so classify an error committed by the trial court (p. 807):

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.* In the case before us this is not so clear."

This doctrine was reaffirmed in Gilmer *vs.* Higley, 110 U. S., 47, wherein this Court said (p. 50):

> "We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that *when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded.* This court in Deery *v.* Cray, 5 Wall., 807, used this language:
>
> "'Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'"

And in V. & M. Railroad *vs.* O'Brien, 119 U. S., 99, already cited *supra*, this Court said (p. 103):

> "It is, however, claimed, in behalf of the plaintiffs, that in his answers to other interrogatories the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal.

"*We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury.* In estimating the damages to be awarded in view of the extent and character of the injuries received, *the jury for aught that the court can know, may have been largely controlled by its statements.* The practice of admitting in evidence the unsworn statements of witnesses, prepared, in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence.

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, *it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.* Smith *v.* Shoemaker, 17 Wall., 630, 639; Deery *v.* Cray, 5 Wall., 795; Moores *v.* Nat. Bank, 104 U. S. 625, 630; Gilmer *v.* Higley, 110 U. S. 47, 50."

As we have already pointed out, the error in the admission of testimony in the case just cited was *much less consequential* than this error in the present case—and yet this Court, in the cited case, specifically declined to classify the error there committed as harmless. We have in this instance a *clear and sharp conflict* between (1) the ruling of this Court in the cited case and (2) the ruling of the Circuit Court of Appeals in the present case.

The rule in question in thus restated by this Court in Columbia & Puget Sound R. R. Co. *vs.* Hawthorne, 144 U. S., 202 (p. 208):

> "As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and *it cannot be known how much the jury were influenced by it*, its admission requires that the judgment be reversed."

To this effect, see also Mexia *vs.* Oliver, 148 U. S., 664, wherein this Court said (p. 673):

> "We cannot say that these errors were immaterial, as *it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs*. Deery *v.* Cray, 5 Wall. 795, 807; Gilmer *v.* Higley, 110 U. S. 47, 50."

In this connection, see also Fillippon *vs.* Albion Slate Co., 250 U. S., 76, wherein this Court said (p. 82):

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

This Court has recently recognized that the rule stated by the foregoing authorities *has not been changed* by the provisions of the Act of February 26, 1919, amending Jud. Code, § 269 (now U. S. C., Title 28, § 391), and providing that there shall be no reversal for technical errors not affecting the substantial rights of a party.

In United States *vs.* River Rouge Improvement Co. *et al.*, 269 U. S., 411, this Court thus described the effect of this statute (p. 421):

> "We need not enter upon a discussion of the divergent views which have been expressed in vari-

ous circuit courts of appeals as to the effect of the Act of 1919. It suffices to say that *since the passage of this Act, as well as before*, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is to be held a *ground for reversal, unless it appears from that whole record that it was harmless and did not prejudice the rights of the complaining party.* See Yazoo Railroad *v.* Mullins, 249 U. S. 531, 533; Fillippon *v.* Albion Slate Co., 250 U. S., 76, 82."

To the same effect, see also the very recent case of Williams *vs.* Great Southern Lumber Co., 277 U. S., 19, wherein this Court declined to classify errors in the exclusion and admission of evidence as not prejudicial, saying (p. 26):

"The judgment was properly reversed on account of these errors. This was not affected by the provision of § 269 of the Judicial Code, as amended in 1919, that in an appellate proceeding judgment shall be given after the examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company. *Since the passage of this act, as well as before*, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, 'is to be held a *ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice* the rights of the complaining party.' United States *v.* River Rouge Co., 269 U. S., 411, 421, 46 S. Ct. 144, 148, 70 L. Ed. 339. *Here it cannot be said from the entire record that the errors were harm-*

less: but on the contrary they were material and of a highly prejudicial character."

As these citations show, this Court established in its early days the rule that error cannot be classified as "not prejudicial error" unless upon a finding that it is *"so clear as to be beyond doubt"* that the error did not and could not have affected the result in the trial court, and *this Court has thereafter consistently applied and enforced this principle.* The ruling of the Circuit Court of Appeals which we here assail is *based upon no such positive finding, but rather upon mere speculative inferences* to the effect that, although there was concededly a *sharp and substantial conflict* in the testimony properly admitted upon the issue of injury, the jury finding for the plaintiff on this issue should be deemed to rest entirely upon the testimony properly admitted, and not at all upon the testimony improperly admitted. This simple statement of the theory upon which the Circuit Court of Appeals classifies this error as "not prejudicial error" is sufficient to *demonstrate the conflict* between (1) the ruling of that Court herein and (2) the decisions of this Court upon the subject.

Earlier decisions of our Circuit Court of Appeals, unlike its present decision, recognize and apply properly the rule enunciated by the decisions of this Court as to the classification of error in the admission of testimony as harmless error. To this effect see the following:

Antietam Paper Company *vs.* Womble, 294 Fed. (5th C. C. A.), 795.

Klein *vs.* Darnell, 239 Fed. (5th C. C. A.), 844.

T. & P. Railway Co. *vs.* Hartford Fire Insurance Co. *et al.*, 230 Fed. (5th C. C. A.), 801.

In the very recent case of V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2) (5th C. C. A.), 114, cited *supra*, this *same court* was confronted with the *identical situation* here involved—the properly admitted testimony of the doctors was *sharply conflicting* upon the issue of injury and hearsay testimony had been erroneously admitted on behalf of the plaintiff upon this issue. The court there properly declined to classify the error as harmless upon the speculative inferences in which it has erroneously indulged in the present case, and said (p. 115):

> "The testimony of a number of doctors as to the extent of plaintiff's injury was very much in conflict. Necessarily that favorable to him depended largely upon his own statements as to his deafness. *It is impossible to say what effect the admission of this certificate had upon the minds of the jurors, in enabling them to resolve any conflict in the evidence.*"

The present case accordingly exhibits *a departure by the Circuit Court of Appeals from its prior habit* of observing the rule stated by the decisions of this Court, as to the classification of error as harmless.

Even the rather incomplete analysis of the testimony in question by the Circuit Court of Appeals (R., 429-30) is sufficient to show that this holding of that court amounts to a *radical departure from the rule settled by numerous decisions of this Court* as to the classification of error as harmless error. A full analysis of this testimony makes this conclusion even more apparent.

There is *ample precedent* for a full examination of the testimony in the record on this phase of the case, if

this Court sustains our obviously correct contention that the District Court erroneously violated the fundamental principles of the hearsay rule when it permitted plaintiff to testify to the jury concerning statements made to him by his physicians. To this effect see Y. & M. V. R. R. *vs.* Mullins, Admx., 249 U. S., 531 (p. 532):

> "It is true generally in cases coming from lower Federal courts that the rendering of an erroneous decision on a particular question, Fidelity & Deposit Co. *v.* Courtney, 186 U. S., 342, 351; West *v.* Camden, 135 U. S., 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; Seaboard Air Line *v.* Moore, 228 U. S., 433, 435; United States *v.* One Distillery, 174 U. S., 149, 151; will not entitle the complaining party to reversal, *if it is clear that his rights were not prejudiced thereby.* And this is likewise true of cases coming from State courts. Chicago, Rock Island & Pacific Ry. Co. *v.* Wright, 239 U. S., 548, 551; New York, Philadelphia & Norfolk R. R. Co. *v.* Peninsula Exchange, 240 U. S., 34, 41-42. See Murdock *v.* City of Memphis, 20 Wall., 590. *Whether the case comes from a State court or Federal court, this Court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record;* State questions being left to the decision of the State court in cases coming here from those courts."

As already stated, the testimony thus admitted over our objections included not only plaintiff's statement that *Dr. Rudolph Matas told him he "was suffering with traumatic conjunctivitis,"* but also plaintiff's statement *"I went to Dr. Bloom twice and they told me my eye was getting very bad"* (R., 116-7; Bill No. 5, R., 385-7). The Circuit

Court of Appeals says that the jury may have inferred that Dr. Matas' statement to plaintiff was based merely upon plaintiff's statement to him, and not upon any examination by him of the plaintiff's eyes (R., 430).

This is the *merest speculation*, since the record is silent on the subject. However, no such *inference could possibly be drawn as to the remark which plaintiff attributed to Dr. Bloom*, since plaintiff specifically states that this remark followed two visits by him to that office (R., 116-7), and that he was taken to Dr. Bloom for an examination of his eyes (R., 116-7).

A brief consideration of the testimony of the three physicians, referred to by the Circuit Court of Appeals as tending to support the jury finding for the plaintiff upon the issue of injury (R., 429-30), will show that there is *no reasonable basis for the speculative inference* of that court that this jury verdict was based entirely upon this admissible testimony, and was not influenced in any way by the erroneously admitted evidence under discussion. The three physicians in question are Dr. Wiltz, Dr. Simms and Dr. Davis.

Dr. Wiltz simply testified that he saw plaintiff a few days after the accident, and found his eyes "red, irritated and watery," and that he referred him to an eye specialist (R., 101).

This eye specialist was Dr. Simms, whose diagnosis of the plaintiff's complaint as traumatic conjunctivitis, or inflammation due to an injury to the eyes, is stressed by the Circuit Court of Appeals in its opinion (R., 429), as a basis for its conclusion that the erroneous admission of

the testimony in question was "not prejudicial error." This witness *very frankly admits* that this diagnosis was based entirely upon the history of the case as given to him by his patient, and that he could see no laceration of the eyes or other evidence showing that the inflammation was traumatic in its origin. To this effect, he testified as follows (R., 109-10):

> "Q. What kind of conjunctivitis was it, traumatic or simple?
>
> A. I diagnosed it as traumatic from the history of the case, but *as far as knowing I can't say.* Conjunctivitis is conjunctivitis. *I diagnosed it as traumatic from the history, the information I got from him.*
>
> Q. What do you mean by traumatic?
>
> A. Inflammation caused by an injury.

Cross-examination.

> By Mr. Suthon:
>
> *Q. Could you see any evidence in Chalters' eyes to show that this was traumatic conjunctivitis rather than simple conjunctivitis?*
>
> *A. No, I couldn't.*
>
> Q. You saw no evidence of injury to his eyes?
>
> A. Yes, there was evidence, the inflammation was there.
>
> Q. That might have been due to injury or some other cause as far as appearance, is that correct?
>
> A. As far as appearance, yes sir.
>
> *Q. Was any laceration of the eye visible?*
>
> *A. No, sir.*"

The plaintiff's visits to this physician terminated in the latter part of March, 1926. Under cross-examination,

this physician identified a written statement which he had signed concerning the treatment of the plaintiff, which reads in part as follows (R., 111):

> "Begun treatment on Feb. 4, 1926, for traumatic conjunctivitis. *He was discharged as well March* 19, 1926. In my judgment, there will be *no permanent injury* following the condition for which I treated him."

Plaintiff says that he stopped going to see Dr. Simms just about the time of his interviews in question with Dr. Bloom and Dr. Matas (R., 116-7). Accordingly the erroneously admitted testimony ascribes to Dr. Bloom the statement that plaintiff's eye *"was getting very bad,"* and to Dr. Matas the statement that plaintiff was *"suffering with traumatic conjunctivitis"* (R., 116-7), at just about the date when Dr. Simms, plaintiff's own witness, testified that he had discharged plaintiff as well, with no permanent injury (R., 111-2).

This analysis shows that the *erroneously admitted testimony in question really tended to make out a much stronger case for plaintiff than did the properly admitted testimony* of this medical witness for plaintiff. In such a situation, *it surely cannot be "so clear as to be beyond doubt"* (5 Wall., 808) that the jury verdict was not influenced or affected at all by the testimony erroneously admitted.

The other physician whose testimony is referred to by the Circuit Court of Appeals as tending to support the plaintiff's case upon this issue, is Dr. Davis, who did not see plaintiff until June, 1926 (R., 102-4), about *two months*

after the date of the remarks attributed by the plaintiff to Dr. Bloom and Dr. Matas. He testified that he removed a piece of glass from plaintiff's eyelid—not plaintiff's eye, as the Circuit Court of Appeals erroneously says—in September, 1926 (R., 102-7).

Under cross-examination, this witness very frankly admitted that he did not ascribe the conjunctivitis or eye-inflammation, which he found, to this piece of glass removed from the eyelid, but that he rather ascribed it to particles of foreign matter other than glass, removed from plaintiff's eyes in June, 1926. To this effect, he testified as follows (R., 105-6):

> "Q. Could conjunctivitis be caused by this foreign body which you removed from his eyes?
>
> A. The foreign bodies I first removed could have caused the conjunctivitis he had at that time.
>
> Q. What were those foreign bodies, Doctor?
>
> A. I can't tell you, in amount, possibly twenty-five or thirty different particles I removed at that time, and they were principally dust, particles of sand and things of that kind.
>
> *Q. Did you notice any foreign bodies that you could identify as glass at that time?*
>
> *A. No, sir.*
>
> Q. Now, this foreign body which you removed in September, 1926, and you identified as glass, could that have caused conjunctivitis?
>
> *A. There was very little conjunctivitis present at that time, so I would say that was not primarily responsible for the conjunctivitis that he had at the time I first saw him.*"

While the testimony of this physician that he found a piece of glass in the plaintiff's eyelid and removed it

tended to support the plaintiff's case, his testimony, quoted above, is clearly to the effect that he did not attribute the conjunctivitis, or eye inflammation, to this piece of glass, but rather to particles of foreign matter other than glass removed from plaintiff's eyes. Since defendant is only charged with injuring plaintiff's eyes by causing particles of broken glass to enter same, this latter bit of testimony certainly *does not tend to support the plaintiff's case* on this issue.

The remarks which plaintiff as a witness attributed to Dr. Bloom and Dr. Matas (R., 116-7) concerning the condition of his eyes, also conflicted sharply with the testimony of Dr. Hardin, a witness for defendants, to whom the plaintiff went immediately after his visit to Dr. Matas' office (R., 117).

Dr. Hardin testified that he found plaintiff suffering with mild conjunctivitis, with no evidence of injury (R., 214-7). Dr. Crebbin and Dr. Buffington who examined plaintiff's eyes after the institution of the suit, also testified, as witnesses for defendants, that they found no evidence or indication of injury (R., 197, 220).

While the petition charged permanent injury (R., 3-4), all of the expert oculists who testified agreed that there was no permanent injury (R., 106, 111, 203, 217, 221, 223). Counsel for plaintiff accordingly *waived the claim for damages for permanent injury* just before the case was argued to the jury (R., 235). The case was then submitted to the jury on the issue of temporary injury only (R., 370), and *upon that issue the erroneously admitted testimony discussed above tended to sustain the case of the plaintiff.*

Plaintiff also had the deposition (not mentioned in the opinion of the Circuit Court of Appeals) of a Dr. Carmichael in Washington, who testified to removing small particles of glass from plaintiff's eyes a day or so after the date of the alleged accident (R., 261-8). This physician did not see plaintiff after February 2, 1926 (R., 261-2), and his testimony accordingly *threw no light* upon the issue of the condition of plaintiff's eyes several weeks after the accident—*the issue upon which defendants were prejudiced* before the jury through the erroneous admission of the hearsay testimony under discussion. This witness admitted under cross-examination that *there were no lacerations or cuts on plaintiff's eyeballs*, although he testified to small abrasions and contusions on the eyelids (R., 265).

The rule against the admission of hearsay testimony is one of the *fundamental and well established principles* of the law of evidence. The argument for a relaxation of that rule in instances when the party quoted is not available as a witness, has *no application whatsoever here.* The rulings of the district judge admitting this testimony over our specific objections were *obviously erroneous.* The failure of the Circuit Court of Appeals to specifically so hold, and the action of that Court in classifying the admission of this evidence as "*not prejudicial error,*" are both *clearly at variance with the pertinent decisions of this Court* and the earlier decisions of that court itself. Upon this point, the judgment under review should clearly be *reversed.*

Point No 3.

Erroneous Admission of Letters from Third Persons to Plaintiff on Claim for Loss of Earnings and Improper Classification of This as Not Reversible Error.

This point (Bill No. 10, R., 400-3) involves the principles of (1) the *hearsay rule* and (2) the classification of error as *harmless error*, discussed in the preceding section of this brief. The ruling of which we complain was made upon the introduction of testimony as to the issue raised by the allegation of the petition that the injuries to plaintiff's eyes had caused him to *lose earnings* amounting to $500 as representative of the Mullins River Lumber Company of Central America (R., 3-4). The Circuit Court of Appeals classifies the ruling as one which *"did not involve reversible error"* (R., 430-2).

The testimony of the plaintiff as a witness on his own behalf tended to show that he was active before the accident as a representative of the concern in question, in an effort to negotiate sales of its products, and that he had succeeded in interesting several prospective buyers who were disposed to purchase (R., 119-21). He further testified that the injury to his eyes prevented him from following up and concluding these deals (R., 121).

The defendants did not dispute plaintiff's employment by this concern. The sole theory of the defense on this phase of the case is that the concern was *a mere promotion scheme which never passed beyond that stage*, and that *it would not have been able to make deliveries* upon any contracts for the sale of its products which plaintiff (but for his alleged injury) might have negotiated.

This theory of the defense is corroborated by the plaintiff's admission that the Mullins River Lumber Company was "*just newly formed*" (R., 120); and also by his admission that his salary of $100 per month was to begin *when "the products were ready for delivery"* (R., 120); and also by his admission that *he had never at any time actually received any compensation whatsoever from the concern* in question (R., 133-4). It is thus evident that, even if the effects of the accident did prevent plaintiff from negotiating sales of the products of the concern in question, *the fact of a pecuniary loss from this depended upon whether plaintiff's principal was functioning as a going concern*, able to make deliveries on contracts for the sales of its products.

The proof on behalf of the defendants (R., 361-5) on this issue is well summarized by the Circuit Court of Appeals in the following language (R., 431):

> "The defendant introduced in evidence the depositions of two witnesses who resided in Honduras (where the Company mentioned was organized and located), and had knowledge of that Company. Their testimony was to the effect that that Company was organized for the purpose of operating a saw mill to convert logs into lumber, *that it had not operated a saw mill or produced anything at the time the depositions were taken*, that plaintiff was employed by that Company and was to get a commission on any business transacted in New Orleans, but he had made no sale and had earned no commissions, and *that that Company was not in a position to fill, by shipment of lumber, any orders for sales of lumber which plaintiff might have obtained* during the months of December, 1925, and January to and including July, 1926."

One of these witnesses, an official of the concern, testified specifically as follows (R., 364):

> "Cross-inty. No. 5. What, in your opinion, could Aaron A. B. Chatters, or any other representative, have earned under the aforementioned contract during the first six months of the year 1926, if he had devoted a reasonable amount of time and energy towards the duties therein stipulated:
>
> "Answer: *We had nothing for him to do and he could have earned absolutely nothing.*"

The other of these witnesses, a resident of Mullins River, testified as follows (p. 365):

> "Cross-inty. No. 1. Please state the general nature of business conducted by the Mullins River Lumber Co.?
>
> "Answer. *Not conducting any business, but intend to cut timber.*
>
> "Cross-inty. No. 2. Does it sell or is it able to sell any products of any kind or nature; if so, state the nature of those products?
>
> "Answer. *No.*"

The plaintiff was called as a witness in rebuttal, *for the specific and restricted purpose of rebutting the defendants' proof on this issue* (R., 229). He identified a *letter* of date November 5, 1925, written to him by the secretary of the Mullins River Lumber Company in Central America, and this letter was admitted in evidence and read to the jury, over the *objection* of counsel for defendants that the writer of the letter was *not produced as a witness under oath and was not subject to cross-examination* (R., 231-3).

This letter contains the following specific passages amounting clearly to *assertions of fact by the writer* that

the Mullins River Lumber Company was *then functioning as a going concern*, and capable of producing and delivering logs or lumber on any contracts for the sale of its products which Chatters might negotiate (p. 232):

> "Your communication of the 27th of October, 1925, came safely to hand and we note with satisfaction that *you have succeeded in disposing of all the Mahogany and Cedar we are capable of producing.*
>
> * * * * * * *
>
> *"We can make delivery in almost short notice."*

This letter was introduced in evidence *for the specific purpose of rebutting the defendants' depositions* on this point, as summarized above, and the suggestion of the Circuit Court of Appeals that nothing in the letter rebutted or conflicted with the defendants' depositions (R., 431) is *at variance with the plain language of the letter*. The letter specifically said "Yes" and the deposition specifically said "No" on the question: "Was the plaintiff's principal a going concern capable of fulfilling, to plaintiff's profit as a salesman, any contracts which he might negotiate for the sale of its products?"

In the recent case of Leach & Company *vs.* Pierson, 275 U. S., 120, this Court held that a letter written by one litigant to the other litigant is not admissible in evidence on behalf of the writer, as proof of the asserted facts therein set forth. To this effect this Court said (p. 128):

> *"A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts."*

Paraphrasing the language thus used by this Court, we submit that a man is equally barred from making evidence for himself by producing letters written to him by some third person and containing assertions of fact, *when the writer of the letter does not appear as a witness, under oath and subject to cross-examination.*

This letter from this Central American promoter was certainly a *much less authentic document* than the army discharge which the plaintiff put in evidence in the case of V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, cited *supra.* Our Circuit Court of Appeals in that case held this to be *reversible error,* since the army discharge was an *ex parte* document, and the defendant had no opportunity to cross-examine the author of the statements therein contained. The ruling in that case *clearly conflicts* with the ruling in the present case admitting the letter in question.

The ruling admitting the letter in question in evidence in the present case is also at variance with numerous authorities on the subject, from which we quote and cite the following:

Texas Company *vs.* Brilliant Manufacturing Company, 2 Fed. (2), (3rd C. C. A.), 1 (p. 2):

> "Defendant further contends that the trial judge erred in refusing to admit the plaintiff's letter of March 26, 1923, to the H. D. Beach Company and its reply. Considering the reply first, we do not see any theory under the facts on this case on which it was admissible. *It was not under oath and not subject to cross-examination.* The Beach Company was not a party to the suit, and

what it said could in no way bind the plaintiff any more than what plaintiff said to the Beach Company could bind the defendant. The testimony of the Beach Company was avaliable, and *if the defendant desired in evidence the contents of the letter, testimony should have been taken under oath in the usual way. The offer was properly overruled.*"

Consolidated Grocery Company *et al. vs.* Hammond, 175 Fed. (5th C. C. A.), 641 (p. 645):

> "The letter, having been written by a third person, without the knowledge of the defendants, and without their subsequent sanction or approval, seems to us to be *hearsay testimony*, so far as the defendants are concerned, and, for that reason, *inadmissible* against them. Nevada Company *vs.* Farnsworth, 102 Fed. 573, 42 C. C. A. 504; Dwyer *vs.* Dunbar, 5 Wall., 318, 18 L. Ed. 489; Insurance Company *vs.* Guardiola, 129 U. S. 642, 9 Sup. Ct. 425, 32 L. Ed. 802; 1 Greenleaf on Evidence (16th Ed.), § 98 *et seq.*; 2 Wigmore on Evidence, § 1361 *et seq.*"

Great Southern Lumber Company *vs.* Williams, 17 Fed. (2), (5th C. C. A.), 468, affirmed 277 U. S. 19.

Security Trust Company *vs.* Robb *et al.*, 142 Fed. (3rd C. C. A.), 78.

Nevada Company *vs.* Farnsworth, 102 Fed. (8th C. C. A.), 573.

This principle is merely another detailed application of the fundamental rule against the admission of hearsay testimony (a rule which the Circuit Court of Appeals in the present case disregarded).

The assertion of the Circuit Court of Appeals that the ruling admitting the letter in question "did not involve reversible error" is *entirely demolished* by the quoted language of the document itself. The authorities which we have cited and quoted in the preceding section of this brief as to the circumstances which will justify an appellate court in classifying the erroneous admission of testimony as "not reversible error," are pertinent also to the point now under discussion. Under these authorities the Circuit Court of Appeals is clearly wrong in classifying the erroneous admission of this letter in evidence as a ruling which "did not involve reversible error."

POINT NO. 4.

Erroneous Denial of Peremptory Instruction on Claim for Loss of Earnings.

At the conclusion of the evidence, the defendants moved for a *peremptory instruction*, withdrawing from the jury the plaintiff's claim for $500 as asserted loss of earnings as a representative of the Mullins River Lumber Company (R., 235). The district judge denied this motion and a bill was duly reserved (Bill No. 11, R., 403-5). The Circuit Court of Appeals approved this ruling, holding that the issue was a question for the jury (R., 432).

The testimony upon this issue is fully stated in the foregoing section of this brief. This testimony shows that while the plaintiff was unquestionably active as the representative of this concern, he had admittedly never received any compensation whatsoever from it up to the time of the accident (R., 133-4), and his earnings from this source were admittedly dependent upon the ability

of this concern to make deliveries of its products under such contracts as the plaintiff might negotiate (R., 120).

The plaintiff himself admitted that the concern was "just newly formed" (R., 120). The depositions which the defendant took in Central America (R., 361-5)—the only sworn testimony by witnesses having knowledge of that locality—were to the effect that this concern was a *mere promotion scheme which had not passed beyond that stage*, either at the time of plaintiff's alleged disability or thereafter, and which never had any products to deliver.

The only real *possible contradiction* of these depositions is found in the *erroneously admitted letter* written to plaintiff by a Central American representative of this concern (R., 232-3), which contains statements as to the ability of this concern to produce and to deliver lumber to customers whom plaintiff might find. The error in the admission of this letter has been discussed in the foregoing section of this brief.

If we take the view of this letter erroneously taken by the Circuit Court of Appeals, that nothing therein "rebutted or was in conflict with the testimony contained in the depositions introduced by the defendants" (R., 431), then there is no contradiction whatsoever of defendants' proof to the effect that this concern was a mere promotion scheme, never able to pay salaries or commissions dependent upon its ability to make actual deliveries of logs or lumber. *This puts the Circuit Court of Appeals in this dilemma: if its ruling on the admission of the letter is correct, then its ruling on the motion to direct a verdict for defendants upon this item of the claim is erroneous; and its ruling on this motion to direct a verdict can possibly be*

correct only if its ruling on the admission of the letter be erroneous.

Since the plaintiff's ability to earn money as a representative of this concern was dependent upon the concern's ability to deliver its products to customers found by the plaintiff; since the only sworn testimony in the record on the subject is to the effect that the concern was a mere promotion scheme which never had any products to deliver (R., 361-5); and since the only possible proof to the contrary is a letter erroneously admitted (R., 232-3), without the attestations of even the *ex parte* oath of the writer, we submit that the case comes within the rule (Small Company *vs.* Lamborn & Company, 267 U. S., 248; Martin *vs.* I. C. R. R. Co., 23 Fed. (2) (5th C. C. A.), 324; Hardy-Burlingham Mining Company *vs. Baker*, 10 Fed. (2) (6th C. C. A.), 277) that in the Federal courts, upon a motion for peremptory instructions, a *mere scintilla or modicum of conflicting evidence* does not entitle the adverse party to go to the jury.

The record contains *no real, definite and positive testimony* tending to support the contention that this concern functioned actively and was able to make deliveries and did actually make deliveries (a condition precedent to plaintiff's receiving compensation from this source) during the period of plaintiff's alleged disability. The following comments are accordingly appropriate upon the case for the plaintiff upon this issue.

> Noble *vs.* Crane & Company, 169 Fed. (6th C. C. A.), 55 (p. 59):
>
> "So that it is the duty of the court to direct a verdict unless the conflict is positive. The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the rea-

> **son of the court, which does not have substance and relevant consequence, which does not have fitness to induce conviction, is not proof, even if uncontradicted, and does not interfere with the duty of the court to direct a verdict."**
>
> **Minahan *vs.* Grand Trunk Railway, 138 Fed. (6th C. C. A.), 37 (p. 46):**
>
> **"And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to induce conviction."**

Upon the foregoing, we respectfully submit that the District Court erred when it permitted the plaintiff to go to the jury on his claim for loss of earnings as the lumber salesman of a promotion scheme which provenly never passed beyond that stage.

POINT No. 5.

Erroneous Peremptory Charge on Joint Liability.

While the district judge left the question of negligence to the jury (R., 370-2), *he peremptorily charged that the operation of the through train in question by the defendants was a joint enterprise, in the nature of a partnership, and that the liability of defendants to the plaintiff was a joint liability.* To this effect, he said (R., 372-3):

> "• • • in this case the selling or initial carrier, the selling agency, the Louisville & Nashville Railroad Company, did something more than merely sell the ticket. It participated in the *joint operation of the train, a sort of partnership.*
>
> • • • • • • •
>
> "Under the circumstances as they are shown

here the liability of these two defendant carriers is *joint.*

. . . . . .

"Here is a *joint enterprise* in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. *They assumed the obligation jointly* with this plaintiff to deliver him in Washington safely in this particular train."

The L. & N. excepted to this charge (Bill No. 4, R., 381-5) upon grounds fully discussed in its concurrent application for certiorari in this case. The Southern also excepted to the charge (Bill No. 16, R., 415-9) *"in so far as it makes the Southern Railway Company responsible for negligence of the Louisville & Nashville Railroad Company."* (R., 418.)

The charge in question was approved in the opinion of the Circuit Court of Appeals. The critical comment in that opinion upon the length of the portion of the charge embodied in this bill (R., 432), is without justification. *The district judge elaborated at considerable length upon his theory of joint liability and his reasons for so charging.* Each defendant *specifically excepted* to the charge imposing a joint liability on the defendants (R., 376), but in the preparation of the bills (Bill No. 4, R., 381-5; Bill No. 16, R., 415-9), in justice to the plaintiff and to the district judge, counsel for defendants *naturally and properly reproduced all of the discussions and comment in the charge on the subject of joint liability and the so-called joint enterprise.*

The charge on joint liability has been fully discussed in the L. & N.'s concurrent application for certiorari, and the authorities cited there are pertinent upon our com-

plaint as to this charge also. We desire to add the following to the citations made by the counsel for the L. & N. on this point:

Pennsylvania Railroad Company *vs.* Jones, 155 U. S., 333:

> "It is the duty of a railroad company, running its trains in connection with other lines, and taking passengers and freight for transportation to points upon connecting lines, to carry them safely to the end of its own line, and there deliver them to the next carrier in the route beyond, and, *in the absence of a special agreement to extend its liability beyond its own lines, such liability will not attach;* and such agreement will not be inferred from doubtful expressions or loose language, but it must be established by clear and satisfactory evidence."

This charge on joint liability is also *clearly at variance with the decisions of this Court* which we have cited in arguing our plea to the jurisdiction (Peterson *vs. C. R. I. & B. Ry. Co.*, 205 U. S., 364; Philadelphia & Reading Co. *vs.* McKibben, 243, U. S., 264; General Investment Company *vs.* Lake Shore & M. S. Ry. Co., 260 U. S., 261, affirming 250 Fed. (6th C. C. A., 160), to the effect that the sale of through tickets and the operation of through trains and through cars is *not such a joint enterprise* as to give to the connecting carriers the status of doing business in the State where the tickets are sold by the initial carrier.

The charge embodying this theory of joint liability was clearly erroneous and this error was *clearly prejudicial to the Southern.* Under the charge as given, the jury was told in substance to return a verdict against both defendants, upon a finding of negligence on the part of either. Since each defendant denied negligence, and since the judge left the question of negligence to the jury, the

verdict against both defendants *may have represented a finding that only one defendant was actually negligent.* For example, the jury may have concluded that the L. & N. was negligent in the inspection of the car and in the preparation of the train at New Orleans, and that the Southern used reasonable care in its inspection and handling of the car from Atlanta to the point of the accident (R., 284-361) and was itself guilty of no negligence.

The evidence showed that the train was *inspected by the Southern* when it reached that line at Atlanta, and also at several points between that point and the point of the accident (R., 284-361; R., 407-8). This inspection, in so far as the screen in question were concerned, was made by a railroad employee who walked along the ground beside the train and looked at the sides of the cars, seeking to observe anything loose or out of order. Such an inspection, however, as to a train in transit was *the only inspection which could be made "consistently with the conduct of the carrier's business."* It was clearly permissible for the jury to find from this evidence that the Southern, as a connecting carrier, had performed its duty of inspection as defined as follows in 10 C. J., 953:

> "The care required as to roadbed, track, machinery, and appliances is not fully exercised by an originally safe construction, but involves such constant inspection for the purpose of discovering defects or dangers which may be developed in the operation of the road, and in remedying the same, as the highest degree of care and foresight would suggest, so far as practicable, *consistently with the carrying on of the carrier's business, and* a neglect of this duty renders the carrier liable to passengers who may be injured by reason of any defect which might have been discovered by such inspection.

> This inspection with respect to both its mode and frequency must be such as can be done consistently with the conduct of the carrier's business. The frequency of inspection is dependent on the liability to impairment, the consequences of which may be apprehended as a result of defective conditions; but *the carrier is not required to keep up a continuous inspection, or to know at each moment the condition of every part of a train.*"

Even if it be assumed that the issue of the Southern's liability, upon its own negligence, was for the jury, *the Southern was at least entitled to have the jury consider this issue unprejudiced by erroneous instructions authorizing the jury to find against the Southern upon the theory of "joint liability," even though it might conclude that the L. & N. was the only negligent defendant.*

Upon the foregoing we respectfully submit that the peremptory charge on joint liability given by the district judge was erroneous and that this error was prejudicial as to the Southern.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment under review should be reversed.

Respectfully submitted,

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Nos. 414 and 415

United States Supreme Court.

OCTOBER TERM, 1928

SOUTHERN RAILWAY COMPANY ET AL.,
Petitioners.

versus

AARON A. B. CHATTERS,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF RESPONDENT.

May It Please the Court:

This brief is intended as an answer to the brief of the Southern Railway Co. and the brief of the Louisville and Nashville Railroad Co., petitioners, seeking to reverse the judgments of the United States District Court in and for the Eastern District of Louisiana and of the United States Circuit Court of Appeals, Fifth Circuit. The decisions of the lower courts are reported as *Chatters vs. Louisville and Nashville Railroad Co. et al.*, 17 Fed. (2) (D. C. E. D. La.) 305, and *Louisville and Nashville Railroad Co. and Southern Railway Co. vs. Chatters*, 26 Fed. (2) (5th C. C. A.) 403. The case is before this Court by reason of writs of certiorari granted to the Court of Appeals, Fifth Circuit.

STATEMENT OF CASE.

A statement of the case is fairly presented in the brief of the Southern Railway Co., Case No. 415, October Term, and we will confine ourselves to stressing those facts which we believe important to the case of respondent. For the sake of brevity, we will hereafter mention the Louisville and Nashville Railroad Co. as L. & N., and the Southern Railway Co. as Southern.

On January 26, 1926, respondent purchased a THROUGH ticket from the L. & N. AT NEW ORLEANS, for THROUGH transportation from New Orleans to Washington, D. C. On the following day he boarded a train known as "Piedmont Limited" at the L. & N. Station and took quarters in combination coach No. 698. He rode in this same coach from New Orleans to Washington. The coach was owned by the Southern, but was cleaned and inspected by the L. & N. at New Orleans. When about two hours' journey from Washington, a screen frame became detached from its mooring and crashed through a pane of glass. Fragments of the shattered glass lodged in respondent's eyes, causing very painful and long enduring suffering. Suit was brought in the United States District Court for the Eastern District of Louisiana, respondent's domicile, on the ground of diversity of citizenship and claim exceeding $3,000. The Southern is a Virginia corporation, with an agent appointed in the State of Louisiana to receive service of process. The L. & N. is a Kentucky corporation, but owns and operates railroad lines and terminals within the State of Louisiana and has an agent appointed within the State to receive service of process.

ANSWER TO BRIEF OF SOUTHERN RAILWAY CO., CASE NO. 415, OCTOBER TERM.

We will answer the contentions of the Southern, and those of the L. & N., Case No. 414, October Term, in one brief, feeling it will serve the same purpose as placing the matter in two briefs.

The Southern urges the following errors:

1st. Overruling plea to the jurisdiction;

2nd. Admission of plaintiff's testimony as to statements made to him by two physicians;

3rd. Admission of a letter referring to the status of a corporation by whom respondent had been employed;

4th. Denial of motion to instruct jury to find for defendants upon plaintiff's claim for $500.00, asserted loss of earnings as a representative of Mullins River Lumber Co.;

5th. Charge of District Judge to the jury that defendants in this case are jointly liable to plaintiff under contract of carriage.

PLEA TO JURISDICTION.

Jurisdiction of the Federal Court for the Eastern District of Louisiana is based upon the following facts:

1st. The ticket upon which this suit is based was purchased in New Orleans. This is admitted by both defendant companies.

2nd. The Southern Railway Co. appointed Mr. J. E. Fitzwilson its agent to receive service of process in New Orleans. This is admitted by the Southern. An agent had been maintained in the State of Louisiana for a number of years prior to the institution of this suit and had never been withdrawn.

3rd. The coaches making up the train, called "Piedmont Limited," which transported respondent from New Orleans to Washington, were furnished by the Southern Railway Co., A. W. P., and the Louisville & Nashville R. R. Co., the proportion of each being determined by agreement on the mileage basis. (Rec. p. 210.)

4th. The Southern directly employs nine persons "soliciting business and working up freight rate information for the public," who are quartered in Room 303 Terminal Passenger Station, New Orleans. Another group of seven is employed in passenger solicitation, with offices maintained in two separate locations, 300 Terminal Station, New Orleans, and the other on the ground floor of the St. Charles Hotel, St. Charles Street, New Orleans. (Rec. pp. 73, 79.)

5th. The Southern Railway Co. owns practically all of the stock of the New Orleans Northeastern R. R. Co., and practically all of the stock of the New Orleans Terminal Co., both Louisiana corporations, domiciled in New Orleans, which companies own property in New Orleans valued at millions of dollars. (Rec. p. 80.)

6th. The president and officers of these two Louisiana corporations and of the Southern Railway Co. are one and the same. (Rec. p. 75.)

7th. A number of officials, in addition to the employes heretofore referred to, are employed in New Orleans whose salaries are paid jointly by the three companies. (Rec. pp. 72, 73, 74.)

These facts unquestionably show: That the Southern Railway Co. is doing business and is present in the City of New Orleans, and that it has an agent in the City of New Orleans to receive service of process. Proof of those facts gives jurisdiction to the Federal Court of New Orleans.

FEDERAL COURT JURISDICTION NOT CONTROLLED BY STATE LAWS.

Jurisdiction of this case was acquired by the Federal District Court for the Eastern District of Louisiana because of diversity of citizenship, claim exceeding $3,000, and domicile of the plaintiff. This is predicated upon the Constitution and Laws of the United States. Art. III, Sec. two, Constitution of the United States, Sections 24 and 51 of the Judicial Code.

It has been repeatedly decided by this Court that neither the statutes of the state nor the decisions of its courts are conclusive upon the Federal Courts.

In the case of *Munter vs. Weil Corset Co.*, 261 U. S. 276, 278, it was said:

> "We have decided in cases which concern the jurisdiction of Federal Courts that notwithstanding the Conformity Act, neither the statutes of the states nor the decisions of their courts are conclusive upon the Federal Court, the determination of such questions being 'in this Court alone.' *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 443."
>
> *Goldey vs. Morning News*, 156 U. S. 518, 520, 523.
> *Barrow vs. Kane*, 170 U. S. 108.
> *Mexican Cent. Ry. Co. vs. Pinkney*, 149 U. S. 194.
> *Harrison vs. St. Louis & S. F. R. Co.*, 232 U. S. 318.
> *Walsh vs. Atlantic Coast Line Ry. Co.*, 256 Fed. Rep. 50, 51.

The cases just cited establish the fact that the jurisdiction of the Federal Courts are not dependent upon state laws or the construction of those laws.

The next logical step is to inquire, under what conditions will the Federal Courts acquire jurisdiction over

a foreign corporation. Two conditions are set forth by practically all of the decisions of this Court:

1st. Was the corporation within the jurisdiction in which it was sued?

2nd. Was process served upon an authorized agent of the corporation?

St. Louis S. W. Ry. vs. Alexander, 227 U. S. 218, 226.
Philadelphia & Reading Ry. Co. vs. McKibben, 243 U. S. 264.
Mo., Kan. & Tex. Ry. Co. vs. Reynolds, 255 U. S. 565.
Michigan Aluminum Foundry Co. vs. Aluminum Castings Co., 190 Fed. 879.
Elk Garden Co. vs. T. W. Thayer Co., 179 Fed. 569.

In the case of *St. Louis S. W. Ry. Co. vs. Alexander*, 227 U. S. 218, cited above, this Court said:

> "In this class of cases, where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, two questions ordinarily arise: First, Was the corporation within the jurisdiction in which it is sued? The second, Was process duly served upon an authorized agent of the corporation? As to the latter question, there is little difficulty in this case, etc. * * * The other question, as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. (Number of cases quoted.)
>
> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be

determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction."

The facts upon which respondent depends to show the presence of the Southern Railway Co. in the City of New Orleans and that it is doing business in that City have been stated heretofore on page — of this brief. They will be repeated because we feel they are important:

1st. The ticket upon which this suit is based was purchased in New Orleans;

2nd. The Southern Railway Co. appointed Mr. J. E. Fitzwilson its agent to receive service of process and his appointment was still in full force and effect when this action was instituted;

3rd. The coaches making up the train which respondent boarded on his journey to Washington were owned by the L. & N., A. & W. P., and the Southern Railway Co., and the train called "Piedmont Limited" was operated out of New Orleans by the three companies under an agreement between themselves.

4th. The Southern directly employs nine persons "soliciting business and working up freight rate information for the public," who occupy an office in New Orleans. Another group of seven is employed in passenger solicitation, with offices maintained in two separate locations, 300 Terminal Station, New Orleans, and the other on the ground floor of the St. Charles Hotel. (This last location is the office where tickets are sold and known as the ticket office.)

5th. The Southern Railway Co. owns practically all of the stock of the New Orleans Northeastern R. R. Co., and practically all of the stock of the New Orleans Terminal Co., both Louisiana corporations, domiciled in New

Orleans, which companies own vast quantities of real estate and railroad equipment located in New Orleans;

6th. The president and other officers of these two Louisiana corporations and of the Southern Railway Co. are one and the same;

7th. A number of officials, in additional to the sixteen employees already referred to, are employed jointly by the three companies and their salaries are jointly paid by the same companies.

For the information of the Court, we believe it is well to state that the Southern owns or controls a number of railroad lines running between New Orleans and Cincinnati and between New Orleans and New York. All of these roads form one continuous system which is termed "Southern Railway System." In New Orleans it owns and controls the New Orleans & Northeastern R. R. Co. and the New Orleans Terminal Co. These two companies are part of the system. On Canal Street, in the heart of New Orleans, there is a railroad passenger station, known as the "Terminal Station." An electric sign with large letters is located above the entrance reading "Southern Railway." (Rec. p. 76.) In this building are housed the nine freight solicitors and three passenger solicitors, heretofore referred to. On St. Charles Street, on the ground floor of the St. Charles Hotel, one of the leading hotels of New Orleans, is located the ticket office of the Southern Railway Co., where four employees of the Southern Railway Co. are located. Over the entrance to this office there is also located a sign reading "Southern Railway System." (Rec. p. 79.) It is needless to argue that a ticket office is a place where tickets are bought and sold, and we should be allowed to presume that the four agents of the Southern Railway Co. are located in the ticket office to sell tickets for the Southern Railway Co.

The testimony of Mr. A. B. Stoll (Rec. pp. 67 to 85), Chief Clerk to the Executive Agent of the Southern Railway System, whose salary is paid partly by the Southern Railway Co., clearly shows that the Southern Railway Co. is present and doing business in the City of New Orleans.

The case at bar is rather similar to the case of *St. Louis S. W. Ry. Co. vs. Alexander*, 227 U. S. 218, 228, where this Court summarized the facts as follows:

> "The testimony disclosed that the two roads together constitute a continuous line from St. Louis, through the states of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the 'Cotton Belt Route.' This combination has an office in the City of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol 'Cotton Belt Route' is used. Underneath appears the general description, 'St. Louis Southwestern Lines,' and there is also named a general eastern freight agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of plaintiff's claim was taken up and considered and correspondence concerning it was had through this office, and a settlement of the claim attempted. * * * In this situation we think this was the transaction of business in behalf of the company by its authorized agent of such manner as to bring it within the district of New York, in which it was sued, and to make it subject to the service of process there. See in this connection *Penn. Lumbermen's Mutual Fire Ins. Co. v. Meyer*, 197 U. S. 415; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 255."

Respondent's case is far stronger than the one just quoted. The present case shows that the Southern is actively present in the City of New Orleans by reason of six-

teen employees located in three different offices, one a ticket office; a number of joint officials; ownership of two local railroad corporations; and last, but not least, an agent to receive service of process. This last fact is a confession that it is doing business in Louisiana. If it is not, there is no good reason for his appointment. In the case just quoted (227 U. S. 218), the railroad company had not appointed an agent. Service was made upon a director of the company.

In the case of *Walsh vs. Atlantic Coast Line Ry. Co.*, 256 Fed. 50, 51, the Federal Court of Massachusetts, said:

> "In this case the defendant was maintaining an office on one of the principal streets of Boston, for which it was paying a very substantial rent; it kept there an agent who was under salary, and whom it advertised as its 'New England Agent;' it also hired and paid an office force to transact its business, through this office and force; it solicited business and arranged for the transportation of persons and freight over its lines. The business carried on at the Washington Street office was not Mr. Johnson's business; it was the business of the defendant. The cause of action here alleged arose out of defendant's undertaking to transport the plaintiff as passenger. While it was not transporting passengers in New England, it was soliciting that sort of business here, and was making contracts in relation thereto. Business evidently of a pretty wide scope, and—to judge from the rent paid and the office force maintained—of substantial volume, between the defendant, on the one side, and passengers and shippers of freight, on the other, was transacted through the Washington St. office. The plaintiff's claim arose out of that sort of business."

In the case of *Block vs. Atchison, T. & S. F. R. Co.*, 21 Fed. 529, 530, the Missouri Circuit Court of Appeals said:

"But, in this case, this corporation defendant has established a business office here, and has an agency. It does not run its railroads here, carry passengers, or transport freight within this district, but it has an office here for the purpose of soliciting business, and has an agent here—not subagent, but a direct agent—employed for the purpose of furthering the transportation business of the corporation in the states where its road runs; the same as various manufacturing and insurance corporations have offices established in different cities for the purpose of extending their business; and, wherever they have an office established, an agency is created."

To the same effect is the case of *Central of Ga. Ry. Co. vs. Eichberg*, 68 A. 690, 107 Md. 363, 14 L. R. A. (N. S.) 389.

Other cases where solicitation of freight and passenger trade, coupled with an office in the State, was held to be doing of business in the State, are the following:

Denver & R. G. R. Co. vs. Roller, 100 Fed. 738, 49 L. R. A. 77;

Chesapeake & O. Ry. Co. vs. Stojanowski, 191 Fed. 720;

Bell vs. N. O. & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102;

Reynolds vs. Missouri, Etc., R. Co., 224 Mass. 379, 113 N. E. 413;

Bagdon vs. Philadelphia & Reading C. & I. Co., 217 N. Y. 432;

Smolik vs. Philadelphia & Reading Coal & Iron Co., 222 Fed. 148.

Other cases, not involving railroads, wherein the Courts have held a corporation was doing business in a foreign State, are the following:

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611;

International Harvester Co. vs. Commonwealth, 234 U. S. 579;
Interstate Amusement Co. vs. Albert, 239 U. S. 560;
International Text Book Co. vs. Peterson, 218 U. S. 664;
Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 115 N. E. 915.

We believe it has been demonstrated that the jurisdiction of the Federal Courts is separate and distinct from that of the state courts; that in acquiring jurisdiction over a foreign corporation, Federal Courts ask only two questions: First, is the corporation present in the state by doing business? Second, has the proper agent been served with process?

The facts in this case positively show that the Southern Railway Co. is present in Louisiana and is doing business in that State.

The action being transitory, it is not confined to the jurisdiction of any particular Court:

Kansas City Western R. Co. vs. McAdow, 240 U. S. 51, 60 L. Ed. 521;
Barrow S. S. Co. vs. Kane, 170 U. S. 100, 42 L. Ed. 964.

The Southern Railway Co. makes the further contention that though it is doing business in Louisiana and is present and found within the State, and though its proper agent has been served with process, still the Federal Courts are without jurisdiction because the business out of which this cause of action arises was not done in the State of Louisiana. In maintaining that position, it relies principally upon three cases decided by this Court, viz.: *Mitchell Furniture Co. vs. Selden Breck Co.*, 257 U. S. 213; *Simon vs. Southern Railway Co.*, 236 U. S. 115; *Old Wayne Mutual Life Assn. vs. McDonough*, 204 U. S. 8.

The first case (257 U. S. 213) might be dismissed because it is not in point. The questions of fact there decided were that the corporation had withdrawn from the State and was not doing business at the time suit was commenced; and "if it had withdrawn from the State the agency of Nash did not extend to receiving service in a suit upon a contract made and to be performed as this was." The Court held that the contract, upon which the action had been instituted, was entered into a state other than the forum. The Court refused to take jurisdiction "when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence." In the case at bar, the Southern was actually doing business in the State of Louisiana at the time suit was instituted, and its duly appointed agent had not been withdrawn.

In the second case, *Simon vs. Southern Ry. Co.*, 236 U. S. 115, there is one vital fact missing which is present in the instant case, and that is, the appointment of an agent within the State to receive service of process. In the *Simon* case, service of process was made upon the Assistant Secretary of State. Defendant company, at that time, had no agent appointed in Louisiana. Suit was commenced in the State courts and judgment taken by default against defendant. No notice was ever served upon the Southern Railway Co. or any of its agents, save the notice served on the Assistant Secretary of State. The present case is different because the Southern, at the time this action was begun, had an agent in Louisiana voluntarily appointed to receive service of process. That is the very point this Court purposely and expressly declined to consider and decide. This Court said, at page 129 of the decision:

(236 U. S. 115): "We therefore purposely refrain from passing upon either of the propositions decided in the Courts below, and without discussing the right to sue on a transitory cause of action and serve the same on an agent voluntarily appointed by the foreign corporation, we put the decision here on the special fact, relied on in the Court below, that in this case the cause of action arose out of the State of Alabama, and the suit therefor, in the Louisiana Court, was served on an AGENT DESIGNATED BY LOUISIANA STATUTE."

This very question was considered and distinguished by the New York Court, in the case of *Bagdon vs. Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, wherein the Court said:

"The defendant concedes that it is engaged in business in New York. It insists, however, that his agency must be limited to actions which arise out of the business transacted in New York. It says any other construction would do violence to its rights under the Federal Constitution. But the plaintiff's cause of action has no relation to business transacted in New York. His cause of action owes its origin to business transacted in Pennsylvania . . .

"Two cases in the Supreme Court of the United States are said to be authority for that conclusion. They are *Old Wayne Mutual Life Ass'n vs. McDonough*, 204 U. S. 8 and *Simon vs. Southern Railway Co.*, 236 U. S. 115.

"In neither case had any agent for the service of process been appointed. In each the court was dealing with the consequences that attach to the refusal to appoint an agent. There was no attempt to decide anything but the precise question involved . . .

"The question now before us is not the one that was decided in *Simon vs. Southern*. It is the exact question which the Court refused to decide.

We are not required to consider how service could be made if the defendant had declined to file a stipulation, etc."

In the case of *Pennsylvania Fire Insurance Co. vs. Gold Issue Mining and Milling Co.*, 243 U. S. 93, this Court points out the fact that in the cases of *Simon vs. Southern*, and *Old Wayne Mutual Life Ass'n vs. McDonough*, no agent had been voluntarily appointed by the defendants, and this Court quotes with approval from the New York case just cited, *Bagdon vs. Phil. & Reading C. & I. Co.*, 217 N. Y. 432.

The third case relied upon by the Southern Ry. Co. to support its contention that the business out of which the cause of action arises must be done in the state where action is instituted, is that of *Old Wayne Mutual Life Ass'n vs. McDonough*, 204 U. S. 8. The cause of action in this case arose outside of the State where suit was instituted; no agent had been appointed by the foreign corporation within the state, and service was made upon the Insurance Commissioner under authority of state statute. This case is similar to the case of *Simon vs. Southern Ry. Co.* just discussed. It also lacks one of the vital elements present in the case at bar, viz: voluntary appointment of an agent to receive service of process within the foreign state.

None of these cases, relied on by the Southern, specifically decide the extent of Federal Court jurisdiction, with or without an agent. They are cases originally commenced in State courts, construe state statutes, and deal with default judgments against foreign corporations who have no agent voluntarily appointed within the state.

We maintain, the jurisdiction of Federal courts does not depend upon state statutes or the decisions of

its courts. All that the Federal court asks in determining its jurisdiction is: "Was the corporation present in the state by doing business? Was service made upon a duly appointed agent within the state?" Answering those questions in the affirmative, the Federal courts look no further.

We are aware of the decisions stating that the mere sale of a railroad ticket, or the soliciting of business, or the isolated transaction, or the mere ownership or control of a local corporation, each fact considered singly, does not constitute "doing business" within the state. But place all of those facts together, then add the following facts: That the corporation runs a train out of New Orleans under a joint agreement with other railroads; contributes its proportion of equipment for that particular train; takes care of the other railroad's equipment when in its possession; joins in the venture for the purpose of giving faster service than its competitors in order to derive the attendant benefits; add also the fact that it employs high officials within the state and pays a portion of their salaries; that it maintains three different offices within the City of New Orleans, one of them a ticket office in the heart of the city; that the ticket, upon which the suit is founded, was sold in New Orleans; and the confession of the Southern that it is doing business within the state by appointing an agent to receive process. The combination of those facts makes the conclusion that the company is doing business within Louisana irresistible. The District Judge, an able and esteemed jurist, a native of New Orleans, familiar with local conditions, found that the Southern was doing business in New Orleans; the Circuit Court of Appeals, one of the members a native of New Orleans, and the other two familiar with local conditions, found the Southern doing business in New Orleans. In 1904,

twenty-five years ago, the Circuit Court of Appeals, in the case of *Simon vs. Southern Railway Co.*, 195 Fed. 56, found that the Southern Railway Co. "was doing business in the Parish of Orleans, State of Louisiana."

It may be urged that it would be a hardship on a foreign corporation to be made to defend actions in any state in which it may be doing business. This action was instituted in the Federal District Court. The jurisdiction of that court is defined by the Constitution of the United States and the Laws of Congress. The Judicial Code specifically names only two forums, in cases of diversity of citizenship, either the domicile of the defendant or the domicile of the plaintiff. Therefore, an action in the Federal courts is localized to only two jurisdictions and is not spread so as to cover every state of the Union. It is just as inconvenient for a plaintiff to sue at the domicile of the foreign corporation as it is for the corporation to defend at the home of the plaintiff. Probably more so, because, as in this case, the defendant foreign corporation is fully represented by its agents, attorneys, and employees, whereas if the plaintiff herein was forced to sue in Virginia, the domicile of the Southern, he would be at a distinct handicap. If this suit were against an individual whose domicile, say, was in California, on a transitory cause of action arising in Maine, the jurisdiction of the Federal District Court for the Eastern District of Louisiana would be unquestioned, if the defendant were served personally in New Orleans. The inconvenience of the defendant in a case of that kind would be great. Why should a corporation enjoy more privileges and immunities? The courts are always eager to protect citizens of other states against default judgments rendered without notice to the defendant, and that is as it should be. All of the jurisprudence of this Court seeks to protect foreign corporations

against fraud and default judgments without notice. But where a corporation is present in the state, has an agent voluntarily appointed to protect its interests therein, and where service is properly made upon that agent, we submit it was never the intention of this Court to deny jurisdiction to the Federal courts under conditions of that kind.

LOUISIANA STATUTES AND JURISPRUDENCE AFFECTING SERVICE OF PROCESS ON FOREIGN CORPORATIONS

The Southern contends that jurisdiction of Louisiana courts, State and Federal, is entirely dependent upon Louisiana Statutes and the decisions of Louisiana courts. That the decisions of Louisiana courts are to the effect that in order for Louisiana courts, State and Federal, to acquire jurisdiction over a foreign corporation doing business in the State of Louisiana and having an agent appointed to receive service of process, it is necessary that the business out of which the cause of action arises must be done within the state.

Respondent denies that the jurisdiction of the Federal courts is dependent upon Louisiana Statutes and the decisions of its courts, but asserts that Federal jurisdiction springs from the Federal Constitution and the laws of the United States.

Whether or not the Louisiana Statutes and decisions of Louisiana courts maintain the contention of the Southern, with respect to origin of action, is very doubtful. However, before discussing these statutes and decisions, we make this notation. If it be true that the jurisdiction of the Federal court is determined by the Statutes of Louisiana, and if it be true that these statutes and the decisions of the state hold as essential to jurisdiction the

origin of the business out of which the cause of action arises must be done within the state, then, in that case, respondent maintains that the business out of which this cause of action arose was done in the State of Louisiana because the ticket, the contract of transportation, was entered into in New Orleans, State of Louisiana. It is admitted by the Southern that Chatters, respondent herein, purchased a through ticket from the L. & N. at New Orleans. This ticket called for transportation from New Orleans to Washington. Respondent boarded a train known as "Piedmont Limited." This train was operated jointly by the L. & N., A. & W. P., and the Southern, under a special agreement between the three companies. (Rec. p. 213.) In that contract of transportation, the Southern was either a principal, under the theory of partnership because of the peculiar facts existing in this case, which will be explained hereinafter, or it was represented by the L. & N., its agent, *quo ad* this particular contract. In either case the Southern transacted this particular piece of business in the City of New Orleans.

> "Where the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation."
>
> 10 C. J., p. 820, Sec. 1261,
>
> *Lehigh Valley R. Co. vs. Dupont*, 128 Fed. 840.
>
> "The initial carrier acts as principal merely with reference to its own line, and as agent of the connecting carrier in contracting for transportation over the connecting line."
>
> 10 C. J., p. 818, Sec. 1260.
>
> *Cowen vs. Winters*, 96 Fed. 929.

A contract for transportation is no different, in principle, than any other contract. A contract entered into by

and between the parties in Louisiana is a Louisiana contract. The present suit is based upon that contract. The contract was to be performed partly in the State of Louisiana and partly in several states of the Union. Foregoing the question of conflict of laws involving the *locus celebrationis* and the *locus solutionis*, as we are not concerned with the validity of the contract *vel non*, we restrict the use of the contract merely to determine whether or not this cause of action arose out of business DONE IN THE STATE OF LOUISIANA. When the Southern agreed with this respondent to convey him from Atlanta to Washington for a certain consideration, it entered into a contract whereby it sold an item of its regular stock in trade. The Southern is a railroad company; its business is to sell transportation, freight and passenger. In New Orleans, where the suit is brought, and where it is present doing a general line of railroad business and represented by an agent authorized to receive service of process, it performed a part of its regular business by selling, through an agent, passenger transportation. We are aware of the fact that the mere sale of a ticket within a foreign state, does not itself constitute such a doing of business as to give the local courts jurisdiction over a foreign corporation. We propose no such theory. Respondent's proof that the Southern is present in Louisiana is based upon other facts. We do maintain, however, that the sale of this ticket was the business out of which this action arose; that it is the contract upon which this action is founded; that it is the particular transaction which gives life and breath to respondent's suit.

Therefore, if this Court should conclude that the jurisdiction of the Federal court is determined by the State Statutes and the decisions of its courts, and that this case shall be determined by Louisiana Statutes and de-

cisions, then we have met all of the requirements set up by the Southern, viz.: the corporation is present in the State; it has an agent to receive service of process; the business out of which this cause of action arose was done within the State.

Supporting its contention that Louisiana Statutes and decisions require the cause of action to arise out of business done within the State in order that Louisiana courts might acquire jurisdiction over a foreign corporation, the Southern relies upon the three following cases: *Missouri Pacific R. R. Co. vs. Clarendon Boat Oar Co.*, 257 U. S. 533; *Delatour and Marmouget vs. Southern Railway Co.*, 4 La. C. A. 658; *Buscher vs. Southern Railway Co.*, 4 La. C. A. 653. The last two are companion cases arising out of the same transaction.

In the first case, the Missouri Pacific R. R. Co. was shown to be a Missouri corporation; Clarendon Boat Oar Co. a New York corporation; suit was filed in Louisiana, for breach of contract entered into and to be performed in the State of Arkansas. The court in Louisiana which passed upon this case is the Court of Appeal, a court having, at the time this decision was rendered, appellate jurisdiction over moneyed demands not exceeding $2,000, and of judgments rendered by justices of the peace. In our humble opinion, it did not properly construe the law nor the decision of the Supreme Court of Louisiana, *Watkins vs. North American Land and Timber Co.*, 106 La. 621, upon which the Court of Appeal founded its decision.

The case of *Delatour & Marmouget vs. Southern Ry. Co.*, 4 La. C. A. 658, was decided by the Court of Appeal for the New Orleans district. In that case the contract for transportation of horses was entered into at Bowie, Md.; accident occurred in South Carolina; suit filed in

State court of Louisiana. This case is partly predicated upon the fact that the Southern Railway Co. does no business in the State of Louisiana. The syllabus by the Court and the body of the decision amply prove this. The syllabus reads as follows:

> "In a transitory action arising in another state, the courts of this State, irrespective of the citizenship of the plaintiff, are without jurisdiction to entertain a suit brought against a foreign corporation **doing no local business within this State.**"

The Court failed to grasp the significance, if it was acquainted with the facts, of the sixteen employees directly employed by the Southern in New Orleans; maintaining three different offices; ownership by the Southern of two local railroads; the joint payment and employment by the Southern of local officials. The case lacked an essential and vital point present in the case at bar—the contract upon which respondent's case is based, was entered into in the City of New Orleans, and the joint operation of the train upon which respondent was injured.

We maintain the rulings of these inferior courts do not supersede the law laid down by the Supreme Court of Louisiana, the Court of last resort in all matters. The Supreme Court of Louisiana decided two cases on this question: *State ex rel. Watkins vs. North American Land & Timber Co.*, 106 La. 621, and *Williams vs. Pope Manufacturing Co.*, 52 La. Ann. 1417. In the *Watkins* case, 106 La. 621, the Court decided three points. One of the points, pertinent to this case, was that a foreign corporation could be sued in the State of Louisiana on a transitory action. The syllabus by the Court reads as follows:

> "Where such corporation has so far complied with the law as to establish an office in this State

> and designate an agent upon whom process may be served, service upon such agent vests the court issuing the same with jurisdiction to hear and determine the cause, IRRESPECTIVE OF THE CITIZENSHIP OF THE PLAINTFF, OR THE SUBJECT MATTER OF THE CONTROVERSY."

At page 627 of the decision, the Court quotes the Statute of Louisiana affecting service of process of foreign corporations doing business in the State and having an agent, and at page 629 it concludes its remarks on that statute in these words:

> "Nor do we find anything in that law whereby the jurisdiction acquired by service of process upon an agent authorized by a foreign corporation to receive the same is limited to any particular class of cases."

To fortify that position, the Court proceeds to cite various authorities and the jurisprudence of other states to the effect that a foreign corporation may be sued in the state where it is doing business irrespective of the origin of the action. At page 631 of the decision, the Court cites the case of *Pope vs. Manufacturing Co.*, 87 N. Y. 137, holding that a citizen of New York was permitted, by the laws of New York, to "sue a foreign corporation upon any cause of action, no matter where originated, and no matter whether the corporation was engaged in business or has appointed an agent to receive service of process in the state or not." In commenting on this case, the Louisiana Court said:

> "It is not necessary, nor would we be disposed, to adopt the extreme view last above referred to. On the contrary, we MIGHT hold that the jurisdiction acquired by service of process on respondent's agent in this State is confined to cases in which

> the cause of action arises here, and nevertheless maintain the jurisdiction so acquired in the instant case."

Then the Court goes on to show that the cause of action really arose in the State of Louisiana. The above last quoted portion of the case does not hold that the cause of action must arise in the State of Louisiana. As a matter of fact, the Court adopts the view, judging from the body of the case and the syllabus, that the cause of action need not arise in the State. The language just used was simply a supposition on the part of the Court to meet the argument that the cause of action must arise in Louisiana, and the Court said even if that argument be correct, the facts in that particular case met with that requirement.

The case of *Williams vs. Pope Mfg. Co.*, 32 La. Ann. 1417, decided by the highest court of Louisiana, positively holds that the Courts of Louisiana will entertain jurisdiction over a foreign corporation with an agent in the State irrespective of where the cause of action arose. The syllabus by the Court reads as follows:

> "The action of trespass is in its character and nature transitory, and follows the person of the owner, and has its *situs* at her domicile, and may be brought against the offender anywhere he may be found, whether a corporation or a natural person."

In that case, Mrs. E. J. Williams, a resident of Mississippi, brought suit against the Pope Manufacturing Co., a corporation of Connecticut, doing business in Louisiana. Suit instituted in State courts of Louisiana. The Court fully maintained the position set forth in its syllabus at page 1434 of its decision, where, after explaining the comity between the courts of the several states, said:

> **"For, if a citizen of Illinois may go into a court of Tennessee or Mississippi with an action for damages which were inflicted in Louisiana, he ought to be accorded a similar right of action in Louisiana courts for injuries inflicted in Mississippi. The legal deduction from this jurisprudence is that the cause of action on a tort or trespass is transitory, and follows the offending party into any jurisdiction wherein he may be found; and further, that, the right of action being personal to the complainant, he may bring it in any court that he may select."**

The last act of the Legislature of Louisiana, which has not been construed, with reference to service on foreign corporations, is Act 184 of 1924. It reads as follows:

> "Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of the said corporation consenting and agreeing on the part of the said corporation that ANY LAWFUL PROCESS against the same which is served upon the said agent or officer SHALL BE VALID SERVICE upon said corporation—And that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation growing out of or connected with the business done by said corporation in this State."

It will be seen that the first part of Section Two does not confine an action against a foreign corporation to liability growing out of or connected with the business done by said corporation in this State. It specifically says: "The appointment of the agent," etc., "shall be contained in a power of attorney," etc., "consenting and agreeing on the part of said corporation that ANY LAWFUL PROCESS

against the same," etc., "SHALL BE A VALID SERVICE UPON SAID CORPORATION."

The next portion of that section provides for the contingency of a removal of the agent from the State, by death, withdrawal, etc., in which case, in order to protect citizens of Louisiana who have done business with the corporation, "the authority shall continue in force and be maintained as long as any liability remain outstanding against said corporation growing out of or connected with the business done by said corporation in this State." If it was the intention of the legislature to limit actions against foreign corporations to matters arising out of business conducted, or connected with business transacted, in this State, that thought would have been incorporated in the first part of Section Two. The general language "ANY LAWFUL PROCESS" would not have been used. The restriction is used to protect citizens of Louisiana doing business with a foreign corporation should the agent's authority to receive service of process be revoked. The Circuit Court of Appeals, in the instant case, held that to be the logical construction of the Act.

We repeat, the jurisdiction of the Federal Court does not depend upon Louisiana Statutes or the decisions of its Courts. The requirements set down by this Court with respect to jurisdiction over foreign corporations, are, that the corporation be doing business in the State, and that service be made upon its proper agent. If this Court should not so hold and constitute the Statutes of Louisiana and the decisions of its Court as the determining factors of Federal Court jurisdiction, then we say the statutes and decisions of Louisiana have been complied with because: (*a*) The more authoritative decisions of the Courts of Louisiana do not require that the cause of action arise in Louisiana; (*b*) In the alternative, if they do, then, that

the business, out of which this cause of action springs, arose in Louisiana because the contract that forms the basis of this suit was entered into in New Orleans.

ALLEGED ERRONEOUS ADMISSION OF HEARSAY EVIDENCE WITH REFERENCE TO STATEMENTS MADE BY TWO DOCTORS NOT WITNESSES, COVERED BY POINT NO. TWO IN BRIEF OF SOUTHERN RAILWAY CO., CASE NO. 415.

The statements involved in this specification of error are quoted as follows (R. 116-7, 386):

> "I went to see Dr. Bloom twice and they told me my eye was getting very bad. I went to see Dr. Rudolph Matas * * * Dr. Matas said I was suffering with traumatic conjunctivitis."

This statement was made by the plaintiff under the following circumstances:

On the witness stand, respondent narrated his search for relief. His eyes were injured and he was suffering considerable pain. When he arrived in Washington, he was treated by Dr. C. P. Carmichael, who testified (R. 261) that he removed particles of glass from respondent's eyes. Fearing serious injury, respondent returned to New Orleans, his home. He immediately visited Dr. Wiltz (R. 116), who testified (R. 101) that he found respondent's eye "red, irritated and watery," and advised him to go to a specialist, "Dr. Simms." Dr. Simms testified (R. 109) that he "found some irritation, conjunctivitis," and kept him under treatment for about two weeks, prescribing "ordinary antiseptic treatment" "eye wash and ointment." Getting no relief, plaintiff sought other doctors. He went to an optician in New Orleans and "tried to get a pair of

glasses." (R. 116.) The optician would not prescribe glasses and took him to see Dr. Bloom, an oculist. He visited this doctor twice. Getting no relief, he visited Dr. Matas. This doctor advised him to see Dr. Hardin, an oculist. (R. 117.) Dr. Hardin treated him from April 1st to May 17th, 1926, and found respondent suffering from mild conjunctivitis, prescribing "drops, an astringent, and an ointment for the conjunctivitis." Later "treated the conjunctivitis with copper sulphate, and instructed him to continue that treatment that he had before that." (R. 215.) Obtaining no relief from this treatment, he visited Dr. R. A. Davis, who treated him from June 4th to September, 1926. R. 102.) In September, 1926, Dr. Davis found and removed a piece of glass from respondent's eye lid. (R. 102, 103.) This gave respondent instant relief. (R. 117.)

Respondent did not depend upon the two sentences uttered by Doctors Bloom and Matas, to prove his injury. It was only an explanation of why he left one doctor to visit another. Respondent proved his injuries by the testimony of Dr. C. P. Carmichael (R. 261), Dr. P. G. Wiltz (R. 101), Dr. J. E. Simms (R. 109), Dr. Geo. L. Hardin, defendant witness (R. 215), and Dr. R. A. Davis (R. 102). Those doctors treated respondent from the time of the accident until September, 1926. Dr. Bloom's statement and Dr. Matas' statement were made in March or April, 1926. There is in the record legal medical testimony to prove injuries covering a period of about three months before and a period of about three months after the alleged objectionable statements were made. No possible injury was suffered by the defendants as a result of this objectionable testimony.

> "Rulings as to evidence, although technically erroneous, will not constitute a ground for reversal where no prejudice results to the party complain-

ing." *Southern Pacific Co. vs. DeValle da Costa*, 190 Fed. 689;

4 C. J., page 963, Sec. 2948.

Sustaining the objection made to the two sentences uttered by these doctors would not have affected result:

> "A judgment will not be reversed, because of the erroneous admission of evidence, where it did not affect the result or could not have done so."
> *Union Cons. Silver Mining Co. vs. Taylor*, 100 U. S. 37, 42 25 L. Ed. 541;
> *Wilhite vs. Houston*, 200 Fed. 390, 118 C.C.A. 542.

Testimony objected to was unimportant and trivial:

> "Error in the admission of evidence is not ground for a reversal where it was not prejudicial to the party complaining, as where it was so utterly irrelevant or immaterial or unimportant that it was obviously harmless."
> *Meeker vs. Lehigh Valley R. Co.*, 236 U. S. 434, 35 S. Ct. 337, 59 L. Ed. 659;
> *Fidelity Mutual Life Assoc. vs. Mettler*, 185 U. S. 308, 321, 22 S. Ct. 662, 46 L. Ed. 922.

Strike out statements objected to and there remains abundant legal medical testimony—the testimony of five doctors to prove injury:

> "A rule which has been stated and applied many times by reviewing courts is that the admission of improper and objectionable evidence is harmless error where the fact involved is fully and clearly established by other evidence which is competent."
> *Cooper vs. Coates*, 21 Wall. 105, 110, 22 L. Ed. 481;
> *The William H. Webb vs. Barling*, 14 Wall. 406, 417, 20 L. Ed. 774;
> *St. Louis R. R. Co. vs. Duke*, 192 Fed. 306, 112 C.C.A. 564.

The hearsay statements of these doctors were made by respondent in leading up to and explaining his movements. They may be hearsay, but were used merely to explain his search for relief. They are not depended upon, and, as a matter of fact, proved nothing. The test in these matters is whether or not substantial injury was done to the complainants.

ALLEGED ERRONEOUS ADMISSION OF LETTER FROM THIRD PERSON TO PLAINTIFF ON CLAIM FOR LOSS OF EARNINGS, BEING ERROR NO. 3 CONTAINED IN BRIEF OF SOUTHERN RAILWAY CO.

Respondent did not attempt to prove his connection with the Mullins River Lumber Co., or the ability of the Mullins River Lumber Co. to fill orders sent in through respondent, by the letter forming the basis of this objection. Respondent testified to his loss of earnings with the Mullins River Lumber Co.; testified to the character of business done by this concern, and its ability to fill orders. (R. 120.) The letter objected to was in the nature of partial corroboration. It proved nothing that respondent had not testified to. Respondent's contract with the Mullins River Lumber Co. was introduced in evidence (R. 230, 231) without objection. The contract is in the form of a resolution subscribed to by the officers and board of directors of the Mullins River Lumber Co., appointing respondent general salesman for the company. If this letter were the only proof in the record of Chatters' loss with the Mullins River Lumber Co., then the objection might be good. Respondent claimed a loss of $500.00 in not being able to carry out the obligations of his contract with the Mullins River Lumber Co.; this disability being caused by the injuries received. He had a right to show by this letter just what he had done and expected to do. He was

on the witness stand, under cross-examination, and the defendants had an opportunity to go fully into the matter of his employment. The document in question antedates Chatters' accident. The contract, which is not objected to, is dated October 6, 1925; the letter objected to is dated November 5, 1925; respondent was injured on January 29, 1926. We repeat, there was no attempt to prove the contents of the letter by the letter itself. It was introduced for and served to corroborate respondent's testimony and to show that he had actually corresponded with the company relative to the purpose for which he was employed. Respondent proved the facts. The letter was secondary.

However, if any harm was done by this letter, which we deny, it was promptly and most efficiently repaired by the lower court when he said, in the presence and hearing of the jury: "The jury will consider the weight and sufficiency of the letter and the fact you have not had opportunity to examine the defendants in rebuttal." (R. 232.)

> "Collateral writings expressly referred to and made a part of an instrument introduced in evidence are admissible in explanation of the latter."
>
> 22 C. J., p. 861, Sec. 1032.
>
> "Letters or telegrams may be so connected with, and related to, an oral or written contract or other transaction as to become a part of the *res gestae* and be admissible as such."
>
> 22 C. J., page 904, note 43.
>
> *Allaun vs. Glen Brook Coal Co.*, 227 Fed. 835, 142 C.C.A. 359.

Admissibility of letter as part of *res gestae* within discretion of trial court:

> "Whether or not a declaration or an act is sufficiently so connected with the main facts as to be admissible as part of the *res gestae* is a matter

which rests largely in the sound discretion of the trial court."

22 C. J., page 460.

A further reason why defendants did not suffer injury as a result of this letter is that respondent's contract with the Mullins River Lumber Co. included the sale of hides, furs, skins, etc. (R. 231.) And the sale of stock of the corporation, for which respondent was to receive five per cent commission. (R. 120.) The letter involved only lumber sales.

"Rulings as to evidence, although technically erroneous, will not constitute a ground for reversal where no prejudice results to the party complaining."

Southern Pacific Co. vs. DeValle da Costa, 190 Fed. 689, 111 C.C.A. 417.

Respondent's testimony with reference to contract and the contract itself control facts—letter only cumulative:

"A judgment will not be reversed, because of the erroneous admission of evidence, where it did not affect the result or could not have done so."

Union Cons. Silver Mining Co. vs. Taylor, 100 U. S. 37, 25 L. Ed. 541;

Wilhite vs. Houston, 200 Fed. 390, 118 C.C.A. 542.

The letter was admissible in corroboration of respondent's contract. If admission of this letter is erroneous, the injury, if any, was not substantial and does not constitute reversible error.

ALLEGED ERRONEOUS DENIAL OF PEREMPTORY INSTRUCTION ON CLAIM FOR LOSS OF EARNINGS, BEING ERROR NO. 4, SOUTHERN RAILWAY CO.

If respondent's testimony is worthless, then we agree with counsel for defendants, the lower court should have directed a verdict against respondent for the loss of earnings as representative of the Mullins River Lumber Co. Why respondent's testimony should be destroyed, we do not know, except that it would help defendants to the extent of $500.00. Respondent's contract with the Mullins River Lumber Co. is printed in full on page 231 of the record. That shows the company was incorporated under the laws of British Honduras, "**and carrying on business** in the manufacture of lumber and other precious woods of various kinds, also dealers in furs, hides, skins, etc." Respondent's testimony (R. 120) shows that he was to also sell stock of the corporation and to receive five per cent commission therefor.

The contract heretofore referred to, signed by the president, vice-president, secretary-treasurer, and all directors of the corporation, shows that, in addition to mahogany lumber, the company was "CARRYING ON" a business for the sale of furs, hides, skins, etc. This contract did not mention that the corporation was in the process of organization, nor that the whole scheme was a "promoter's scheme." The contract is a rather practical and real proposition. Of course, some of the stock was yet on the market, and respondent was offered five per cent for whatever stock he could place in the United States. He was to receive $100.00 per month just as soon as he had formulated plans and the products were ready for delivery. (R. 120.) Just as he was about to produce results, this accident occurred

which incapacitated him. He was prevented from selling stock; he was prevented from selling lumber; he was prevented from selling skins, hides and furs. He lost whatever commissions he might have earned during that time. Though he made nothing as a result of this connection prior to the accident and the mill was unable to deliver lumber during the time of his disability, the accident actually prevented and delayed his receiving a salary of $100.00 a month for just so long as he was disabled. Plaintiff attempted to introduce into evidence another letter from the Mullins River Lumber Co., wherein said company agreed to pay plaintiff $100.00 per month, in accordance with respondent's testimony. The introduction was objected to and sustained, the lower court being of the opinion the letter might be self serving. (R. 234.) Five hundred dollars is not a very large sum of money and a man of respondent's ability could have easily earned this amount selling stock, furs, hides and skins, excluding lumber. The Court will note all of the officers and members of the board of directors certify in the contract with respondent (R. 231) that the company is "CARRYING ON BUSINESS IN THE MANUFACTURE OF LUMBER, etc." It will also be noted that the vice-president serving at the time of the contract was not connected in that capacity with said company when the interrogatories were sent to Honduras by defendant company. Respondent testified to what he lost with the Mullins River Lumber Co. as a result of his injuries. Should this testimony be destroyed by that of a vice-president, whose testimony was a surprise and could not be rebutted by interrogatories for the reason that the time between the arrival of the interrogatories and the date of the trial was too short. The only witnesses who could have rebutted this testimony resided in British Honduras.

However, the lower court heard all of the testimony and he concluded it was a question to be determined by the jury. The jury had all of the facts before them; the judge had all of the facts before him. The lower court was of the opinion that respondent's proof of his loss of salary was sufficient to place before the jury. The jury was unanimously of the opinion that plaintiff was entitled to all or part of this claim. Why should this Court concern itself with and disturb questions of fact, unless a foolish or frivolous claim was allowed? The judge of the lower court is noted for his sound thinking, learning and integrity. He would not have allowed a frivolous claim to go through. The jury was composed of reputable and intelligent business men of our community. If a fraud had been attempted, that jury, with the able assistance of attorneys for defendants, would have soon found it.

ALLEGED ERRONEOUS PEREMPTORY CHARGE OF JOINT LIABILITY, BEING POINT NO. 5, SOUTHERN RAILWAY CO.

This same error is alleged by the Louisville and Nashville Railroad Company, co-defendant herein, being Assignment No. 3 of specification of errors set out by that company in its brief to this Court. Inasmuch as this point affects the Louisville and Nashville R. R. Co. more closely, being the initial carrier and the accident occurring on the line of the connecting carrier, we will discuss this point in answer to the brief of the L. & N., being case No. 414, October Term.

CONCLUSION.

For the reasons assigned, we respectfully submit that the judgments under review, as to the Southern Railway Co., should be affirmed.

ANSWER TO BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD CO., CO-DEFENDANT, CASE NO. 414, OCTOBER TERM.

Errors Specified.

Three errors are assigned by this defendant:

1st. Alleged error of Circuit Court of Appeals in not holding that the District Court was in error in refusing to direct a verdict in its favor;

2nd. Error of Court of Appeals in approving refusal of lower court to give a certain charge, prepared by the L. & N., with reference to its liability;

3rd. Charge of lower court with reference to "joint venture or joint enterprise" of two defendant carriers.

We will answer these points in the order stated.

ASSIGNMENT NO. 1—L. & N.

This point involves the liability of an initial carrier with respect to damages suffered by a passenger while on a connecting carrier.

At the outset, we admit that ordinarily an initial carrier is not responsible for what happens to a passenger while he is in the hands of the connecting carrier, particularly if the ticket issued to the passenger contains a provision, such as the ticket in this case did, that the initial carrier "acts only as agent and is not responsible beyond its own lines." It is understood that lines of a railroad company do not reach every point in the United States and it is necessary for a passenger to board a different train of a different company at intervals for the purpose of completing a long journey. In cases of this kind, ordinarily the train of the initial carrier is altogether

different from that of the connecting carrier. Passengers usually leave the train of the initial carrier and, either in the same station or at another station, board a train of the connecting carrier. Under these facts it would be unreasonable to hold the initial carrier for the acts of the connecting carrier, unless there is an agreement to the contrary, or unless there exist peculiar facts drawing the initial carrier into the transaction.

The facts in the case at bar are peculiar and distinct; they are quite different from the facts ordinarily found. The facts in the case of *Missouri Pacific R. R. Co. vs. Prude*, 265 U. S. 99, relied on by this defendant, are not the facts existing in the present case.

The facts here are that the Louisville and Nashville Railroad Co. and the Southern Railway Co. (a third company is involved, but that is immaterial to the discussion of the case) entered into an agreement to run a special through train called the "Piedmont Limited" from New Orleans to Washington, D. C., and from Washington to New Orleans. (R. 213.) Under this agreement, each component company was to furnish a certain number of the coaches composing the train, on the basis of mileage; each company was to furnish locomotive power and train crews over its own lines; each company, while in its possession, would **clean, wash and repair** the equipment of the other; each company would divide the fares on the basis of mileage. (R. 171, 210, 211.) The "Piedmont Limited" was a special through train. Each and every coach that left New Orleans would go through to Washington. The passengers remained in the same coaches from New Orleans to Washington and vice versa. (R. 210, 211.) The coach that respondent occupied from the time he left New Orleans until he reached Washington was Combination Car No. 698, the property of the Southern Railway Co., being

part of the equipment furnished under its agreement with the L. & N. (R. 207.) The L. & N. cleaned and washed this coach before placing it in the train which transported respondent to Washington. (R. 171.) In order to wash the windows it was necessary to remove the screens. (R. 171.) The screen which caused this accident, like all of the others, was fastened by means of two hinges on one side and a thumb screw on the other side. (R. 169.) In order to open them, it was necessary to remove the thumb screw. The contention of respondent is that the thumb screw holding the screen which flew open and caused this accident was improperly replaced by the employees of the L. & N. at New Orleans. Having improperly fastened this screen, it was guilty of negligence. It was further guilty of negligence in failing to detect the defect on its numerous inspections between New Orleans and Montgomery. The Southern took over the train with this defective screen. It also failed to detect the defect in its numerous inspections between Atlanta and Washington. The screen became unfastened gradually, and finally flew open near Washington. If the screen had been properly replaced at New Orleans, it would have remained fast. At New Orleans, by the L. & N., the screen was improperly replaced. It gradually worked itself loose. Proper inspection along the route would have found the danger. The L. & N. failed to find it; the Southern failed to find it, though a number of inspections were made by both roads.

Under these facts, how could the lower court possibly direct a verdict for the L. & N.? The whole question is one of fact. Was the L. & N. guilty of negligence? Did its negligence contribute to the accident? Did or did not the L. & N. properly replace the screen before the coach left New Orleans? These were questions for the jury. The lower court so held and the Court of Appeals affirmed his ruling. The fact that the screen did the damage while

in the possession of the Southern does not absolve the L. & N. of its negligence. That negligence started in New Orleans and continued in effect until the accident occurred. The case of *Missouri Pacific R. R. Co. vs. Prude*, 265 U. S. 99, quoted by this defendant, is not applicable. There the passenger purchased a round trip ticket from Forrest City, Ark., to Houston, Tex. She traveled on the line of the Missouri Pacific to Texarkana, Ark. From that point to Houston, she traveled over the line of the International and Great Northern R. R. Co. While on the line of the latter company, the passenger was assaulted by the auditor of the connecting line. Her ticket contained a provision limiting initial carrier's liability to its own lines. Passenger stated she did not read ticket. That case does not contain the vital element present here, viz., that the L. & N. was guilty of negligence in placing into service a defective car; that the negligence continued and traveled on unto the line of the connecting carrier and there caused the damage.

The provision stipulated on its ticket, limiting its liability to its own lines, cannot prevail against its negligence. A common carrier cannot by contract absolve itself of negligence. This would be contrary to public policy and an unreasonable regulation:

> "In analogy to the rule established by the great weight of authority in the case of carriers of goods, that any contract relieving the carrier from liability for negligence is invalid, IT IS WELL SETTLED THAT ANY CONTRACT PURPORTING TO EXEMPT A COMMON CARRIER OF PASSENGERS FROM LIABILITY FOR NEGLIGENCE OF ITSELF OR ITS EMPLOYEES TO A PASSENGER particularly when carried for hire, IS VOID, as being against public policy."
>
> 10 C. J., p. 714, Sec. 1154;

Inman vs. South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612;

Phoenix Ins. Co. vs. Erie, Etc., Transportation Co., 117 U. S. 312, 6 S. Ct. 750, 29 L. Ed. 873;

Hart vs. Penn. R. Co. 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717.

"And the authorities are practically unanimous in support of the proposition that NO CONTRACT, CONDITION, OR LIMITATION WILL RELIEVE THE CARRIER FROM LIABILITY TO A PASSENGER carried for compensation FOR THE CONSEQUENCES OF THE NEGLIGENCE OF THE CARRIER OR ITS EMPLOYEES."

10 C. J., p. 714, 15, 16.

New York Cent. R. Co. vs. Lockwood, 17 Wall. 357, 21 L. Ed. 627;

Baltimore, Etc., R. Co. vs. McLaughlin, 73 Fed. 519, 19 C.C.A. 551.

The L. & N., under Assignment No. 1, quotes sub-sections 1 and 7 of Section 6 of the Interstate Commerce Act, as amended Feb. 28, 1920. It also quotes from a number of cases dealing with tariffs, rates, and charges. The act quoted and the cases cited relate to rates and fares and are not applicable to this case.

It is well settled that, when the relation of carrier and passenger exists, the passenger simply proves contract and his injury. The burden is then upon the carrier to prove that the accident happened through no negligence on its part. The doctrine is known as *res ipsa loquitur*:

Gleeson vs. Virginia Midland R. Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458;

New Jersey R., Etc., Co. vs. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Midland Valley R. Co. vs. Conner, 217 Fed. 956, 133 C.C.A. 628;

Irvine vs. Delaware, Etc., R. Co., 184 Fed. 664, 106 C.C.A. 600.

Carriers owe the highest degree of care, skill and diligence to passengers:

Pennsylvania Co. vs. Roy, 102 U. S. 451, 26 L. Ed. 141;

Irvine vs. Delaware, Etc., R. Co., 184 Fed. 664, 106 C.C.A. 600;

Columbia, Etc., R. Co. vs. Means, 136 Fed. 83, 68 C.C.A. 651.

This defendant cited several cases to the effect that the doctrine of *res ipsa loquitur* does not apply against a party when the instrument is out of his control and management. These cases involved either an employee, or that the defect was not caused or contributed to by the company against whom it was urged. None of them release the initial carrier of negligence to a passenger simply because the negligence does not cause damage until the instrument is in the hands of another.

ASSIGNMENTS NOS. 2 AND 3—L. & N.

These assignments cover the special charge requested by the L. & N. and the charge actually given by the lower court.

As to the requested special charge. The trial court clearly distinguished the liability of the two defendant companies and we will so demonstrate in a discussion of the charge actually given.

However, it is impossible to separate the L. & N. from the Southern with respect to this PARTICULAR TRAIN called the "Piedmont Limited," and more particularly with respect to the coach which caused this accident. The L. & N. and the Southern are jointly liable for three reasons:

1st. The defective coach that caused plaintiff's injuries was owned by the Southern; it was incorporated

into a train operated out of New Orleans by the L. & N.; the only possible explanation of the accident is that the L. & N., in replacing the screens, after washing windows, failed to properly replace the screens; that the defect continued until the coach was turned over to the Southern; that the Southern had possession of the train from Atlanta to Washington, made numerous inspections but negligently failed to find the defect. In order to free themselves of liability, the doctrine of *res ipsa loquitur*, placed the duty upon the L. & N. and the Southern to show that neither was guilty of negligence. They utterly failed to explain the cause of the accident. The only evidence in their behalf is "inspections." The L. & N. failed to prove it was free of negligence; the Southern failed to prove it had rendered to this passenger the highest degree of care, skill and diligence. How can the liability of these two roads be separated?

2nd. The operation of this train called the "Piedment Limited," unquestionably shows some sort of partnership arrangement. Each of these defendants entered into an agreement with the other to run this PARTICULAR TRAIN (R. 213). The purpose, it is only natural to infer, was to discourage passengers in the use of other roads because of the convenience and speed offered by this PARTICULAR TRAIN. The two defendants each furnished a certain number of coaches and other equipment for every train; each road repaired and cleaned the equipment of the other; the particular coach in which this plaintiff was injured was the property of the Southern and incorporated into the train of the L. & N.; each road divided the money paid by passengers, on the mileage basis:

> "The definition of a partnership which seems to be most accurate and comprehensive is that of Chancellor Kent, as follows: 'A contract of two or more competent persons to place their money,

effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.'"

3 Kent. Comm. (30 Cyc., p. 349).

"In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than * * * that those persons are partners, who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions."

Meehan vs. Valentine, 145 U. S. 611, 623, 12 S. Ct. 972, 36 L. Ed. 835.

Of course we do not propose the theory that the L. & N. and the Southern are partners in all of their respective operations; but it is urged that with respect to this particular train, "Piedmont Limited," the facts are so overwhelming and convincing that no other conclusion can be reached.

"Ordinarily the owners of a ship are not partners; but when it is built under a special agreement, whereby one of the owners is to be master and the other to be ship's husband, and the vessel is employed on joint account as a regular packet between certain stations, it is a partnership affair, both as to ship and freight."

30 Cyc., pages 367, 368, note 93.

This principle was upheld in the case of *Lehigh Valley R. R. Co. vs. Dupont*, 128 Fed. 830, where the Court said:

(At page 843): "The freight and passenger business between the two corporations has been done upon a mileage basis, the charges being prorated, and each receiving its proportion."

(At page 845): "And where the lines of several railroad corporations are conducted as a single system for the purpose of the traffic between dif-

> ferent points originating upon either, the corporations may constitute themselves a partnership for the business of such traffic; and when they do, although the general management of each road is retained by the corporation owning it, the several corporations are, as to such business, partners, and liable upon the principles of the law of agency."

The third point, indicated above, upon which the liability rests upon these defendants jointly, is that the "Piedmont Limited," was a THROUGH TRAIN. That it is so, is amply proved by Mr. Bose, L. & N. official, in his testimony (R. 210). The train is advertised as a THROUGH TRAIN by both companies. Every coach, every sleeper, and "even the day coaches" go through from New Orleans to Washington. (R. 211.) It is known to the railroads, to railroad men, and to the public in general from New Orleans to Washington that the "Piedmont Limited" is a limited, through train. What is the jurisprudence on the question of liability of the initial carrier when a THROUGH ticket is sold? It may be called a coupon ticket, transfer, contract or any other name. The name given to the ticket does not alter the service promised and given. We do know that the "Piedmont Limited" is a through train:

> "Where the contract of the carrier selling the ticket is for THROUGH TRANSPORTATION, it is the principal, and the connecting carrier continuing the transportation of the passenger under such ticket is the agent of the carrier selling the ticket for the purpose of carrying out the contract of transportation, and in such case the CARRIER SELLING THE TICKET WILL BE LIABLE FOR ANY FAULT OF THE CONNECTING CARRIER OR ITS EMPLOYEES."
>
> 10 C. J., p. 820, Sec. 1261, note 69.
>
> *Lehigh Valley R. R. Co. vs. Dupont*, 128 Fed. 840;

Clements vs. Wash. P. S. B. Co., 162 Fed. 815, 89 Am. D. 147;

Chollette vs. Omaha, Etc., R. Co., 26 Nebr. 159, 4 L. R. A. 135.

"Where a passenger purchased a through ticket over several roads from one of them, authorized to act in this regard for the others, all the roads are liable for injuries to her from the negligence of any one of them."

El Paso & N. E. Ry. Co. vs. Landon, 124 S. W. 744, 58 Tex. Civ. App. 397;

Texas Cent. R. Co. vs. Marris, 101 S. W. 1177, 100 Tex. 530.

"Where the shipper receives an injury beyond the line of the initial carrier, caused by a defective appliance on the car, even though the connecting carrier is charged with the duty of inspecting the car, its failure so to do will not relieve the initial carrier from responsibility for negligence in assigning the shipper a defective car."

Blatcher vs. Philadelphia, Etc., R. Co., 31 App. (D. C.) 385, 16 L. R. A. (N. S.) 991;

Brook vs. Brooklyn Union El. R. Co., 148 App. Div. 668, 133 N. Y. S. 253;

Missouri, Etc., R. Co. vs. Ryan (Tex. Civ. A.) 177 S. W. 525;

Missouri, Etc., R. Co. vs. Foster, (Tex. Civ. A.) 87 S. W. 879.

However, should this Court hold that the agreement between the two defendant companies does not constitute a partnership, and that a contract for through transportation does not hold the two companies jointly liable, nevertheless the two companies remain responsible jointly on the question of negligence which started in New Orleans and continued until the moment of the accident. As previously stated, the testimony of the two New Orleans inspectors for the L. & N. (R. 171, 177) shows that the screens

on this particular coach were opened, just prior to its departure, for the purpose of washing the windows. Unquestionably the thumb screw, which holds the screen fast to the body of the car, was improperly replaced and gradually worked loose until it pulled out and caused the accident. It is the only plausible explanation, particularly so since the defendant companies fail to explain. Everyone of those screens were opened. All of the thumb screws were removed and replaced. Only one flew open. Therefore, the question of fact to be determined by the jury, and it was so instructed by the trial court, was: Did the car cleaners of the L. & N., at New Orleans, properly replace the thumb screws? This phase of the L. & N.'s activities with reference to the operation of the "Piedmont Limited" was under the charge of its employees; those employees failed to give the highest degree of care, skill and diligence owed to the passengers. The negligence continued until the train was placed in the care of the Southern, and that road failed to find the defect, although the train was inspected a number of times along the route.

CHARGE GIVEN BY TRIAL COURT.

The special charge requested by the L. & N. was refused because it was contained in the general charge given by the lower court:

> "It is elementary and well settled that the court may properly refuse requested instructions, although they announce correct rules of law, where the propositions therein enunciated are fully and correctly covered by the general charge or by either instructions given on request of either party."
>
> 38 Cyc., p. 1711 (e).
>
> *Maryland Fidelity, Etc., Co. vs. Courtney*, 186 U. S. 342;
>
> *Northern Pac. R. Co. vs. Babcock*, 154 U. S. 190;

Brown vs. U. S., 150 U. S. 93;
Ayers vs. Watson, 137 U. S. 584.

The Circuit Court of Appeals held that the special requested charge was contained in the general charge. It further held (R. 429) that the requested charge omitted "any mention of the L. & N.'s preparation of the car for its entire journey from New Orleans to Washington," • • • and "was calculated to divert the jury from the consideration of the question as to due care being or not being used in replacing and refastening the screens before the car left New Orleans."

> "The giving of instructions which are abstract or are not authorized by the pleadings and evidence will not constitute ground for reversal, where no prejudice results to the complaining party; and this is so whether or not the instructions state correct rules of law. This principle has been applied to instructions • • • relating to the joint liability of employers for injury to servants."
>
> 4 C. J., pages 1033, 34 and 35.
> *Snyder vs. Rosenbaum*, 215 U. S. 261, 265, 30 S. Ct. 73, 54 L. Ed. 186;
> *Georgia R. R. Co. vs. Hunter*, 12 Ga. A. 294, 77 S. E. 176.

Comparing the special charge with the charge given by the trial court, we fail to find any substantial difference. The jury's attention is called to the statement printed on the back of the ticket and limiting the liability of the initial carrier, saying that condition would be binding upon the passenger. (R. 372.) It went further, saying: "But in this case the selling or initial carrier, • • • did something more than merely sell the ticket. It participated in the joint operation of the train, a sort of partnership." (R. 373.) The Court then summarized the testi-

mony of Mr. Bose, the L. & N. official, showing beyond doubt that, in truth and in fact, the train was jointly operated by the two defendants.

On pages 373, 374 on the record, the Court explained the respective duties of the carriers. Quoting therefrom:

> "The Southern Railway Co. on receiving this train was likewise obligated to this passenger, and to escape liability the burden was upon the Louisville & Nashville R. R. Co. to show positively that this equipment, this latch on this particular screen in this case, was in good order when it left here, not worn, or in some other manner affected by the weather and age, and shift the burden thereby to the Southern Railway to show positively to your satisfaction that it used the highest degree of care and prudence in handling of the train after it received it."

This charge told the jury how the negligence of either or both of the defendants was to be determined. If it was found that the L. & N. had carried out its legal obligations, it was to be released. If the Southern proved it performed its legal duty towards the passenger, then it was to be released.

Following this question further, we find at page 376 record, a statement made by the trial court in the presence of the jury: "I think I made it clear that the liability was on both, since both were jointly liable and jointly sued, to show that neither of them were guilty of negligence *quo ad* the plaintiff." Again, at page 378 record: "Mr. Suthon: 'Finding for both defendants or either defendant.' The Court: 'Finding against either one or both.'" The charge taken *in toto*, clearly demonstrates that the jury was instructed to find for the plaintiff against either the L. & N. or the Southern, or against both, or against plaintiff.

The complaint of the L. & N. because of the refused special charge is directed at the refusal of the Court to use the particular words contained in the special charge, rather than the omission of the Court to charge the law as requested:

> "The decisions almost universally hold that a judge is not bound to charge the jury in the exact language of the requests for instructions by counsel. Although the requested instructions be correct as propositions of law and warranted by the evidence, the form of expression may be his own. If he instructs the jury correctly and in substance covers the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request."
>
> 38 Cyc., page 1704.
>
> *Cunningham vs. Springer*, 204 U. S. 647, 27 S. Ct. 301, 51 L. Ed. 662;
>
> *New York, Etc., R. Co. vs. Winter*, 143 U. S. 60, 75, 12 S. Ct. 356, 36 L. Ed. 71;
>
> *Continental Imp. Co. vs. Stead*, 95 U. S. 161, 24 L. Ed. 403;
>
> *Clymer vs. Dawkins*, 3 How. 674, 11 L. Ed. 778.

CHARGE ON JOINT LIABILITY

The charge of the trial court with respect to "joint liability" and "joint operation" is not and was not meant as a statement of law covering every case. Whenever those phrases were used, they were joined with the opinion of the judge with respect to the evidence produced on this trial. **"Under the circumstances as they are shown here** the liability of these two defendant carriers is joint." (R. 373.) **"Here is** a joint enterprise, etc." (R. 373) referring to the facts brought out in the evidence. Therefore, the charge of the trial court is not that in every case where there is a connecting carrier, the liability is joint. He states clearly and specifically, that the evidence ad-

duced in this particular case shows a joint operation of the train and a joint liability. However, explaining to the jury that they might find against either or both of the defendants. Whether or not the operation of the "Piedmont Limited" was a joint enterprise was a matter of fact, within the realm of the jury. The complaint made by the defendants against the charge of the trial court is **not** against the law therein set forth, **but against the right of the trial court to comment on the evidence.** The judge heard the evidence, and, in commenting thereon, he stated the proof tended to show that the operation of the "Piedmont Limited" was a joint enterprise. However, the jury was the judge of the facts, and were told they might disagree with him and bring in a verdit against either of the defendants.

CONCLUSION.

It is submitted that, for the reasons hereinabove assigned, the judgments of the two lower courts should be affirmed.

Respectfully submitted,

GEORGE PIAZZA,
ST. CLAIR ADAMS,
Attorneys for Aaron A. B. Chatters, Respondent.

SUPREME COURT OF THE UNITED STATES.

Nos. 414 and 415.—October Term, 1928.

Louisville & Nashville Railroad Company, Petitioner, 414 vs. Aaron A. B. Chatters. Southern Railway Company et al., Petitioners, 415 vs. Aaron A. B. Chatters.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 15, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a citizen of Louisiana, brought suit in the District Court for Eastern Louisiana against the Southern Railway Company, a Virginia corporation, and the Louisville & Nashville Railroad Company, a Kentucky corporation, to recover for personal injuries suffered while traveling in a car of the Southern Railway in a through train from New Orleans, Louisiana, to Washington, D. C. At the time of the accident, the train was being operated by the Southern over its tracks in Virginia.

Respondent purchased a through coupon ticket for the journey at the office of the Louisville & Nashville in New Orleans, which entitled him to passage over the line of the Louisville & Nashville from New Orleans to Montgomery, Alabama, over the Atlanta & West Point Railroad from Montgomery to Atlanta, Georgia, and thence to Washington over the line of the Southern. He took passage in New Orleans on a car of the Southern and proceeded in it on his journey until, while on the line of the Southern in Virginia, a window screen, attached to the outside of the car, became loosened and swung backward on its hinges so as to strike and break the car window behind it and injure respondent with pieces of flying glass. The train was made up by the Louisville & Nashville in New Orleans, and was operated under an agreement

among the three carriers concerned, which was not offered in evidence. But it appeared that the cars composing the train were furnished by the three carriers on the basis of their respective mileage; that each furnished locomotive power and train crews over its own line; and that each, while in possession of the train, was in exclusive control of it.

Process against both petitioners was served on their respective agents in Louisiana, designated by them to receive service of process as required by a state law exacting formal consent by the corporation that any "lawful process" served on the designated agent should be "valid service" upon the corporation. Act No. 184 of 1924.[1] The Southern, appearing specially before answer, excepted to the jurisdiction on the ground that the cause of action, which was transitory, arose outside Louisiana and not out of any business done by the Southern within that state. After a hearing, in which evidence was introduced, the exception was overruled. 17 F. (2d) 305. On the trial the district court gave judgment on a verdict for respondent against both petitioners, which was affirmed by the Court of Appeals for the Fifth Circuit. 26 F. (2d) 403. This Court granted certiorari October 15, 1928. — U. S. —.

The Southern alone seeks a review of the order overruling its exception to the jurisdiction. The Louisville & Nashville assigns as error the refusal of the trial court to give a requested instruction to the jury. Both petitioners raise for consideration here exceptions to the charge of the court to the jury and to the admission of certain testimony.

1. The Southern insists that the case as to it should have been dismissed on its exception for want of jurisdiction of the person of the corporation upon a suit in Louisiana on a cause of action arising outside that state. A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the jurisdiction in such manner and to such extent as to warrant the infer-

[1] The scope of the designation is defined by the state statute as follows:

"Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of said corporation consenting and agreeing on the part of the said corporation that any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation and that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation growing out of or connected with the business done by said corporation in this State."

ence that it is present there. *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *St. Louis Southwestern Ry.* v. *Alexander*, 227 U. S. 218. Even when present and amenable to suit it may not, unless it has consented, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93; *Smolik* v. *Phila. & Reading Coal Co.*, 222 Fed. 148, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction. *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U. S. 8; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115.

It is urged by the Southern that compliance with the Louisiana statute requiring a foreign corporation doing business within the state to designate an agent to receive service of process is, under the state decisions, a consent to suit only upon causes of action arising out of business conducted within the state, *Watkins* v. *North American Land & Timber Co.*, 106 La. 621; *Delatour & Marmouget* v. *Southern Ry. Co.*, 4 La. App. 658; *Buscher* v. *Southern Ry. Co.*, 4 La. App. 653; see *Missouri Pac. R. R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, which, it is insisted this is not, and that in any case, in the absence of an authoritative decision by the state court, this Court will give a like effect to the designation under the statute. *Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, 257 U. S. 213. For present purposes we may assume that the effect of the designation of the statutory agent by the Southern is, as the state decisions cited seem to show, that a cause of action arising wholly outside and wholly unconnected with any act or business of the corporation within the state may not be sued upon there, and we address ourselves to the question, decisive of this branch of the case, whether the Southern, being present within the state of Louisiana, is amenable to suit, on this cause of action as one arising out of business done within the state, or from such action of the corporation within the state as to subject it to liability there.

The Southern does not deny that it is carrying on some business within Louisiana or that it is subject to suit there on some causes of action. Its relation to the through train service originating in New Orleans, so far as disclosed, has already been detailed. It carries on in the state, through an office and agents of its own there located, continuous solicitation of freight and passenger traffic. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *International Text-*

book Co. v. *Pigg*, 217 U. S. 91, 103; *Block* v. *Atchison, Topeka & S. F. R. R. Co.*, 21 Fed. 529; *Walsh* v. *Atlantic Coast Line R. R. Co.*, 256 Fed. 47; but see *Green* v. *C. B. & Q. Ry.*, 205 U. S. 530; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. It maintains its own office there for the sale of tickets for passage over its own and connecting lines. Cf. *International Harvester Co.* v. *Kentucky*, *supra*, at p. 585. It has designated an agent there to receive service of "lawful process", which fact, being of significance in determining the extent of the jurisdiction when the corporation is doing business within the state, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.*, *supra*, is, we think, also of decisive weight in determining its presence for purposes of suit when coupled with its other corporate activities within the state. It is, therefore, as petitioner concedes, so far present in the state as to be amenable to suit there for some purposes. *St. Louis Southwestern Ry.* v. *Alexander*, *supra*. We disregard the fact that the Southern owns the stock, or most of it, of the New Orleans Railroad Company and the New Orleans Terminal Company, Louisiana corporations owning real estate and railroad equipment there, and that its officers and theirs are the same. *Peterson* v. *Chicago, R. I. & Pac. Ry.*, 205 U. S. 364; *Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264.

The cause of action here asserted is one arising out of a contract for transportation, evidenced by the through ticket sold to respondent in New Orleans and accepted by the Southern for transportation over its line. It purported on its face to be sold by the Louisville & Nashville as agent and was sold under a joint tariff agreed to by the carriers concerned and filed by them with the Interstate Commerce Commission providing that the carrier selling the ticket acted as agent of the others. Had the ticket been sold to respondent by the Southern at its own ticket office in New Orleans, we may assume that it would not have been seriously contended that the cause of action did not arise out of the business of the Southern in Louisiana, or that the present suit could not have been maintained there, even though the wrongful act complained of took place elsewhere. But it is said that as the ticket was sold by the Louisville and Nashville, that transaction alone, under the decisions of this Court, would not constitute doing business within the jurisdiction so as to make the Southern amenable to suit there. *Peterson* v. *Chicago, R. I. & Pac. Ry. Co.*, *supra*; *Phila. & Reading Ry. Co.* v. *McKibbin*, *supra*; *General Inv. Co.* v. *Lake Shore &*

M. S. Ry. Co., 250 Fed. 160. From this it is argued that the sale of the ticket cannot be considered any part of the business carried on within the state by the Southern and that the present cause of action is therefore not within the consent to suit given by its designation of an agent, or to be implied from its presence and transaction of business within the state.

But the sale in Louisiana of the ticket for transportation over the Southern was made by the Louisville & Nashville under the filed joint tariff as the agent and for account of the Southern. In its legal effect it was the act of the Southern within the jurisdiction by which its obligation to respondent on the contract of carriage over its own lines became complete. It was out of this action within the state that the present obligation of the Southern arose, although the alleged breach of it occurred elsewhere.

This was none the less the case because such a transaction would not of itself have been regarded as a doing of business within the state sufficient to establish the presence of the Southern there for the purpose of suit. Cf. *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516. Since the Southern was present and subject to suit in Louisiana, we are concerned, not with the question whether the sale of the ticket was sufficient to bring it there, but only with the question whether, being there, its liability extended to all causes of action arising out of its corporate acts within the state, including this one. No case, either in the Louisiana courts or in this Court, has held that it did not. Where jurisdiction has been denied, the cause of action not only arose outside the state, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there. Cf. *Old Wayne Mutual Life Ass'n* v. *McDonough*, *supra*; *Simon* v. *Southern Ry. Co.*, *supra*; *Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, *supra*. In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the state through the doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the state. *Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, at p. 216. But where the cause of action does arise out of a corporate act within the jurisdiction, the presumption would seem necessarily to be the other way.

In the absence of express language limiting the authority of the designated agent, there would certainly be no ground for assuming that the consent extends to causes of action growing out of some of its acts within the jurisdiction and not others—that respondent here might maintain an action if the ticket had been sold at the office of the Southern, but not if sold at the office of its authorized agent in the same city. Once established that the foreign corporation is within the state for purposes of suit, its presence for that purpose would seem to be co-extensive with its presence for the purpose of carrying on any corporate transaction within the jurisdiction and, granted the former, its liability to suit on causes of action growing out of the latter should follow. To say that not every corporate act within the jurisdiction is sufficient to establish its presence there for the purpose of suit is very different from saying that a suit founded upon such an act may not be maintained there, once its presence and consent to suit are established.

We decide only that, in the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, it operates as a consent to suit upon a cause of action like the present arising out of an obligation incurred within the state although the breach occurred without. See *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra.*

2. The requested instruction to the jury of the Louisville & Nashville, which was refused, and the actual charge complained of, related to the alleged joint liability of the petitioners. The complaint contained no allegation that respondent's injury was due to the negligence of the Louisville & Nashville. He contented himself with alleging and proving at the trial the accident and injury while he was travelling over the line of the Southern on a through ticket purchased of the Louisville & Nashville. As already indicated, it appeared that the Louisville & Nashville had no control of the train after it left its own tracks and each carrier furnished its own locomotive power and train crew. Each inspected, cleaned, washed and repaired the equipment of the train. It also appeared that the ticket sold by the Louisville & Nashville contained a clause reading: "In selling this ticket and checking baggage thereon the selling carrier acts only as agent and is not responsible beyond its own line". The through tariff filed by petitioners with the Interstate Commerce Commission under § 6 of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, 380, as amended by

Act of February 28, 1920, c. 91, 41 Stat. 456, 483, contained a similar provision.

At the close of the whole case, the Louisville & Nashville moved for a directed verdict, which was denied. The trial judge also denied its request for an instruction that if the jury found the ticket contained the clause referred to, the accident did not occur on the line of the Louisville & Nashville, and its negligence did not cause or contribute to the accident, the verdict should be for that carrier. The court also charged, in a variety of ways, that the liability of petitioners for the safe delivery of the respondent at his destination was joint and that if petitioners "failed to satisfactorily explain the accident, then negligence will be presumed and they will therefore be liable to the passenger for whatever damage he sustained".

But there was no basis, either in pleading or proof, for a joint liability of both petitioners for the negligence of one. Neither of them, as a common carrier, was under any duty, either by the common law or statute, to transport or assume any responsibility for the transportation of respondent beyond its own line. *Insurance Company* v. *Railroad Company*, 104 U. S. 146, 157; see *Railroad Company* v. *Manufacturing Co.*, 16 Wall. 318, 324. The Louisville & Nashville, therefore, might, by stipulation on the through ticket, provide that it should not be so responsible, *Missouri Pac. R. R. Co.* v. *Prude*, 265 U. S. 99; cf. *Western Union Tel. Co.* v. *Czizek*, 264 U. S. 281; and in any case, the transportation service to be performed was that of a common carrier in interstate commerce under published tariffs and the attendant limitation of liability in the tariff became the lawful condition upon which the service was rendered, binding alike on the carrier and its patron, cf. *American Ry. Express Co.* v. *Daniel*, 269 U. S. 40; *Western Union Tel. Co.* v. *Priester*, 276 U. S. 252, 259; *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Davis* v. *Cornwell*, 264 U. S. 560, and was not subject to waiver. Cf. *Davis* v. *Henderson*, 266 U. S. 92; see *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U. S. 190, 197. There was, therefore, no evidence of joint liability of the petitioners in the case, and there could be no liability of either for injury to respondent occurring beyond its own line except on the theory that its own negligence caused or contributed to the injury.

The court of appeals, in commenting on petitioner's requested charge, to which we have referred, said that such a charge would

not have been proper because it was calculated to divert the jury from the consideration of the question whether the accident was attributable to the negligence of the Louisville & Nashville. Even if for this reason the requested instruction should have been refused, the charge, to which proper exception was taken, that petitioners were jointly liable and that on this theory the jury might find a verdict against the Louisville & Nashville for an accident occurring on the line of the Southern, was plainly erroneous, as it indicated to the jury that they might find a verdict for respondent against the Louisville & Nashville, even though it had exercised due care in the preparation and inspection of the train while on its own line.

We think also there was no evidence for the jury of negligence of the Louisville & Nashville and that the motion for a directed verdict in favor of that railroad should have been granted. There was no evidence of the precise cause of the loosening of the screen which caused the injury. Whether the screw which fastened it was improperly replaced by the employees of the Louisville & Nashville after cleaning the window, or whether it broke or otherwise became loosened on account of some hidden or unascertainable defect, or was loosened by others than the employees of either petitioner, does not appear. There was evidence of an inspection of the car by the Louisville & Nashville before it left New Orleans. After the car left the line of the Louisville & Nashville it came into the custody of the Atlanta & West Point Railroad Company. The occurrence of the accident after the car passed beyond the control of the Louisville & Nashville and that of the intermediate carrier to the tracks of the Southern does not admit of the application of the doctrine of *res ipsa loquitur*, so far as concerns the Louisville & Nashville. *McNamara* v. *Boston & Maine R. R.*, 202 Mass. 491, 499; *L. & N. R. R. Co.* v. *Mink*, 168 Ky. 394; *cf. Glynn* v. *Central Railroad*, 175 Mass. 510; *Missouri, Kansas & Texas Ry. Co.* v. *Merrill*, 65 Kan. 436. Without resort to this doctrine, the cause of the accident and the relation of the Louisville & Nashville to it are matters of mere speculation and conjecture which should have been withdrawn from the consideration of the jury. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U. S. 472, 478; *St. Louis-San Francisco Ry. Co.* v. *Mills*, 271 U. S. 344, 347.

The charge as to the joint liability of petitioners was also excepted to by the Southern "in so far as it makes the Southern Railway Company responsible for the negligence of the Louisville & Nashville". To that extent it was clearly erroneous and prejudicial to the Southern. The jury was in effect told to return a verdict against both petitioners on a finding of negligence on the part of either. As there was evidence of repeated inspections of the window screens by the Southern after the car reached its line and before the accident, from which the jury might have found that there was no want of care on the part of the Southern, the jury may have found that the accident was due to the negligence of the Louisville & Nashville and so have returned a verdict against both. Even though the issue of the Southern's own negligence was for the jury, it was entitled to have the issue submitted unprejudiced by the erroneous instruction which authorized a verdict against the Southern on the theory of joint liability if the jury should conclude that the Louisville & Nashville alone was negligent.

3. As there must be a new trial, it is unnecessary to consider the rulings on the evidence which the court below thought erroneous, but not prejudicial. The order overruling the Southern's exception to the jurisdiction is affirmed. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.